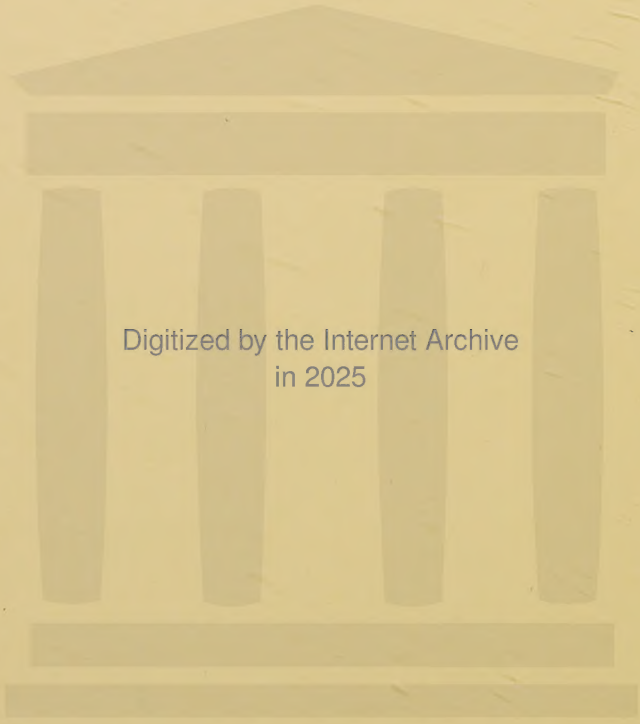

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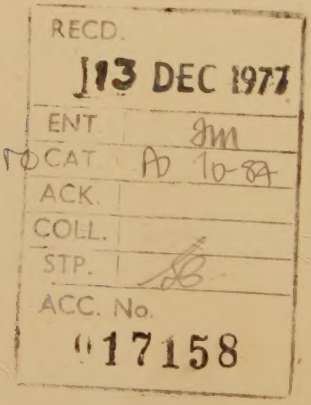

This Work,

WHICH WAS FORMERLY DEDICATED TO

JOSEPH UNDERHILL, Esq., Q.C.,

THEN

Recorder of Newcastle-under-Lyme

AND A

Master of the Bench of the Honourable Society of the Middle Temple,

IS NOW

MOST REGRETFULLY INSCRIBED

To his Memory.

EDITORS' PREFACE.

IN this Edition we have retained the general arrangement of topics adopted hitherto, but have made some alterations in detail. Thus we have removed the subject of the Employers' Liability Act to Part II., and have entirely rearranged the chapters on Defamation, and on Negligence and Nuisance. We have also devoted a chapter to the rule in *Fletcher* v. *Rylands*, references to which occurred in several places in earlier editions.

The subject of the Workmen's Compensation Acts has received somewhat fuller treatment than in the last Edition. Though liability under those Acts is not strictly in tort, no student's work on the Elements of Tort would be complete without some reference thereto.

We have endeavoured to bring the text up to date by incorporating the effect of all recent cases of sufficient importance to find a place in a student's book, and, to make room for new matter without increasing the bulk of the work, we have

omitted considerable portions of the section on Nuisances to Incorporeal Hereditaments.

On consideration we have come to the conclusion that the Law as to the Creation of Easements and the Nature of Rights of Common, Ferries and Fisheries belongs properly to the Law of Property, and that it is only necessary in a work on the Law of Torts to consider what acts constitute disturbance of those rights.

Mr. UNDERHILL wishes to acknowledge the great assistance rendered by Mr. PEASE, upon whom practically the burden of preparing this Edition for the press has fallen.

ARTHUR UNDERHILL.

J. G. PEASE.

September, 1911.

EXTRACT FROM PREFACE

TO THE EIGHTH EDITION.

The fact that seven Editions of this Work have been sold, that an American firm have thought it worth their while to issue an unauthorised edition in the United States, and that a Canadian edition has been published, render it no longer necessary to apologise for its existence.

Many of my friends and clients have expressed surprise that an Equity and Conveyancing Counsel should have written a Treatise on the Law of Torts. The answer is, that every lawyer, whatever his speciality may be, ought to know the *principles* of every branch of the law; and, in my student days, my endeavours to fathom the principles of the Law of Torts were surrounded with so much unnecessary difficulty, owing to the absence of any text-book separating *principle* from *illustration*, that I became convinced that a new crop of students would welcome even such a guide as I was capable of furnishing. The result has proved that I was not mistaken.

Indeed, however useful the great treatises then existing were for the practitioner, they were almost useless to the student. In the first place, to his unaccustomed mind they presented a mere chaos of examples, for the most part unexplained, and, in the absence of explanation, seeming very often in direct contradiction. What student without careful explanation would grasp the difference between *Fletcher* v. *Rylands* and *Nichols* v. *Marsland* for instance?

In the second place, the men are few indeed who can trust their memories to retain the contents of a large

treatise with accuracy; and although that is not necessary, yet it *is* essential that they should accurately remember the *principles* of the law.

For these and other reasons, I ventured to write this work; and I still think that if a student will *thoroughly master* it, he will know as much of the *principles* of the Law of Torts as will suffice to make him a competent general practitioner, and to pass him through his examinations so far as that subject is concerned.

I do not assert for one instant that it will enable him to answer every case that comes before him, but I am not acquainted with any man whose mental stock enables him to do this. In the vast majority of cases the practitioner who has any regard for the interests of his clients, or the reputation of himself, will turn to his digests and his reports; for however well he may understand the principles of the law, it is only very long practice indeed, or the intuition of genius, which enables him to apply these principles to complicated facts with ease and certainty.

* * * * *

ARTHUR UNDERHILL.

5, NEW SQUARE, LINCOLN'S INN, W.C.
1st June, 1905.

TABLE OF CONTENTS.

PAGE

PREFACE vii
TABLE OF STATUTES CITED xix
TABLE OF CASES CITED xxiii
INTRODUCTION 3

PART I.

OF TORTS IN GENERAL.

CHAPTER I.

OF THE NATURE OF A TORT.

ART. 1. Definition of a Tort 7
„ 2. *Ubi jus ibi remedium* 11
„ 3. Of Volition and Intention in relation to the unauthorised Act or Omission 12
„ 4. Malice and Moral Guilt 14
„ 5. Of the Connection of the Damage with the unauthorised Act or Omission 16
„ 6. The Act or Omission must be unauthorised 19
„ 7. Act of State 20
„ 8. General Immunity of Judicial Officers 21
„ 9. General Immunity of Executive Officers 23
„ 10. Authorisation by Statute 24
„ 11. *Volenti non fit injuria* 27
„ 12. To what Extent Civil Remedy interfered with where the unauthorised Act or Omission constitutes a Felony 28

CHAPTER II.

BREACH OF STATUTORY DUTIES.

PAGE

ART. 13. Breach of Duty created for Benefit of Individuals ... 31
„ 14. Breach of Duty created for Benefit of Public ... 32
„ 15. Highway Authorities not liable for Nonfeasance ... 33

CHAPTER III.

RELATION OF CONTRACT AND TORT.

ART. 16. Distinction between Actions for Tort and for Breach of Contract 37
„ 17. Privity not necessary where the Remedy is in Tort... 38
„ 18. Duties gratuitously undertaken 40

CHAPTER IV.

VARIATION IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORISED ACT OR OMISSION TAKES PLACE OUTSIDE THE JURISDICTION OF OUR COURTS.

ART. 19. Torts committed Abroad 43

CHAPTER V.

OF PERSONAL DISABILITY TO SUE AND TO BE SUED FOR TORT.

ART. 20. Who may sue 45
„ 21. Who may be sued for a Tort 46
„ 22. Joint Tort-feasors 49

CHAPTER VI.

LIABILITY FOR TORTS COMMITTED BY OTHERS.

Section I.—LIABILITY OF HUSBAND FOR TORTS OF WIFE.

ART. 23. Wife's Ante-nuptial and Post-nuptial Torts ... 51

Section II.—LIABILITY OF PARTNERS FOR EACH OTHER'S TORTS.

ART. 24. Statutory Rule 53

Section III.—LIABILITY FOR TORTS OF AGENTS AUTHORISED EXPRESSLY OR BY RATIFICATION.

PAGE

ART. 25. *Qui facit per alium facit per se*... 54
,, 26. Ratification of Tort committed by an Agent ... 54

Section IV.—LIABILITY FOR TORTS OF SERVANTS.

ART. 27. Respondeat Superior 55
,, 28. Unauthorised Delegation by Servants 61
,, 29. Servants of the Crown 62

Section V.—LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTORS.

ART. 30. The General Rule 63

CHAPTER VII.

THE EFFECT OF THE DEATH OR BANKRUPTCY OF EITHER PARTY.

Section I.—COMMON LAW.

ART. 31. Death generally destroys the Right of Action ... 69
,, 32. Effect of Bankruptcy 70

Section II.—STATUTORY LIABILITY FOR CAUSING DEATH.

ART. 33. Actions by Personal Representatives of Persons killed by Tort 71

CHAPTER VIII.

OF DAMAGES IN ACTIONS FOR TORT.

ART. 34. Damages for Personal Injury 77
,, 35. Damages for Injury to Property 78
,, 36. Presumption of Damage against a Wrongdoer ... 80
,, 37. Consequential Damages 81
,, 38. Prospective Damages 82
,, 39. Aggravation and Mitigation 83
,, 40. Insurance not to be Taken into Account 85

CHAPTER IX.

OF INJUNCTIONS TO PREVENT THE CONTINUANCE OF TORTS.

PAGE

ART. 41. Injuries remediable by Injunction 87
„ 42. Public Convenience does not justify the Continuance of a Tort 90

CHAPTER X.

OF THE LIMITATION OF ACTIONS FOR TORT.

Section I.—THE STATUTES OF LIMITATIONS.

ART. 43. The Principal Periods of Limitation... 93
„ 44. Commencement of Period 94
„ 45. Continuing Torts 96
„ 46. Disability 97

Section II.—PUBLIC AUTHORITIES PROTECTION ACT, 1893.

ART. 47. Special limitation in favour of Public Officers and Authorities 98

PART II.

OF RULES RELATING TO PARTICULAR TORTS.

CHAPTER I.

OF DEFAMATION.

ART. 48. Definitions 103
„ 49. What is Defamatory 104
„ 50. When Special Damage essential to Action for Slander 108
„ 51. The Libel or Slander must refer to the Plaintiff ... 113
„ 52. Publication 114
„ 53. Repeating Libel or Slander 115
„ 54. Justification 117
„ 55. Fair Comment 118

PAGE

ART. 56. Absolute Privilege 120
„ 57. Qualified Privilege 123
„ 58. Apology 128
„ 59. Slander of Title and Slander of Goods 129

CHAPTER II.

OF MALICIOUS PROSECUTION.

ART. 60. General Rule 133
„ 61. Prosecution by the Defendant... 134
„ 62. Want of Reasonable and Probable Cause 135
„ 63. Malice 137
„ 64. Failure of the Prosecution 138
„ 65. Damage 139
„ 66. Maliciously taking Proceedings in Bankruptcy ... 140

CHAPTER III.

OF MAINTENANCE.

ART. 67. Definition 143

CHAPTER IV.

OF SEDUCTION.

ART. 68. Enticing and Harbouring 145
„ 69. The Ordinary Action for Seduction 146
„ 70. Misconduct of Parent 149
„ 71. Damages in Ordinary Action for Seduction 150

CHAPTER V.

TRADE MOLESTATION.

ART. 72. Inducing Breach of Contract 153
„ 73. Molestation by Threats, Violence and Conspiracy ... 155
„ 74. Unlawfully Securing Custom 157

CHAPTER VI.

OF DECEIT OR FRAUD.

ART. 75. Definition of Fraud 161
„ 76. When an Action will Lie for Fraudulent Statements 162
„ 77. The Liability of Directors and Promoters of Companies 165

CHAPTER VII.

OF NEGLIGENCE.

PAGE

ART. 78. Definition 167
„ 79. Duty of Persons Using Highway to take Care ... 169
„ 80. Duty of Carriers of Passengers 170
„ 81. Duty of Occupiers of Land and Houses to Persons coming by Invitation, etc. 171
„ 82. Duty of Bailees of Goods 176
„ 83. Duty to take Precautions with regard to Things Dangerous in themselves 177
„ 84. Contributory Negligence 181
„ 85. Effective Cause 184
„ 86. Onus of Proof 185
„ 87. Duties of Judge and Jury 187
„ 88. *Volenti non fit Injuria* 187

CHAPTER VIII.

LIABILITY FOR BREACH OF DUTY TO PREVENT DAMAGE FROM DANGEROUS THINGS AND ANIMALS.

ART. 89. The Rule in *Fletcher* v. *Rylands* 191
„ 90. Damage by Animals 196
„ 91. Duty to Keep Fire from doing Mischief 200

CHAPTER IX.

LIABILITY OF EMPLOYERS FOR INJURIES TO THEIR SERVANTS AND WORKMEN.

Section I.—COMMON LAW LIABILITY.

ART. 92. The Doctrine of Common Employment 204
„ 93. Volunteer Servants 208

Section II.—THE EMPLOYERS' LIABILITY ACT, 1880.

ART. 94. Epitome of Act 209

Section III.—THE WORKMEN'S COMPENSATION ACT, 1906.

ART. 95. Liability to Pay Compensation 212

CHAPTER X.

OF PRIVATE INJURY FROM PUBLIC NUISANCES.

PAGE

ART. 96. Description of Public Nuisances 217
„ 97. Public Nuisance only actionable in respect of Particular Damage 220
„ 98. Liability of Owner or Occupier for Public Nuisances 221

CHAPTER XI.

PRIVATE NUISANCES.

Section I.—NUISANCE TO CORPOREAL HEREDITAMENTS.

ART. 99. General Liability 225
„ 100. Reasonableness of Place 228
„ 101. Plaintiff coming to the Nuisance 230
„ 102. Liability of Occupier and Owner for Nuisances ... 231
„ 103. Prescription to Commit a Nuisance 232
„ 104. Remedy of Reversioners for Nuisances 234
„ 105. Remedy by Abatement... 235

Section II.—NUISANCES TO INCORPOREAL HEREDITAMENTS.

ART. 106. Disturbance of Right of Support for Land without Buildings 238
„ 107. Disturbance of Support of Buildings 241
„ 108. Disturbance of Right to Light and Air 242
„ 109. Disturbance of Water Rights... 245
„ 110. Disturbance of Private Rights of Way 248

CHAPTER XII.

TRESPASS TO THE PERSON.

ART. 111. General Liability for Trespass to the Person ... 249
„ 112. Definition of Assault 250
„ 113. Definition of Battery 251
„ 114. Definition of False Imprisonment 253
„ 115. Justification of Trespass to the Person 254
„ 116. Self-defence as Justification of Assault and Battery 255
„ 117. Justification by Parental or Other Authority ... 256
„ 118. Justification by Judicial Authority 257
„ 119. Power of Magistrates to Arrest or order Arrest ... 258
„ 120. Power of Constables and Others to Arrest in Obedience to Warrant 259

PAGE

ART. 121. Power of Constables and Private Persons to Arrest for Felony without Warrant 260
„ 122. Power of Arrest for Preservation of the Peace ... 262
„ 123. Arrest for Misdemeanor 263
„ 124. Institution of Criminal Proceedings endangers Right of Action for Assault 264
„ 125. Amount of Damages 265

CHAPTER XIII.

OF TRESPASS TO LAND AND DISPOSSESSION.

Section I.—OF TRESPASS QUARE CLAUSUM FREGIT.

ART. 126. Definition 267
„ 127. Trespassers *ab initio* 269
„ 128. Possession necessary to enable the Plaintiff to maintain an Action for Trespass 270
„ 129. Trespasses by Joint Owners 272
„ 130. Limitation 272
„ 131. Remedies other than by Action 273

Section II.—OF DISPOSSESSION.

ART. 132. Definition 274
„ 133. Onus of Proof of Title 274
„ 134. Limitation 276
„ 135. Commencement of Period of Limitation 276

CHAPTER XIV.

TRESPASS TO GOODS, DETENTION AND CONVERSION OF GOODS.

ART. 136. Definitions 279
„ 137. Possession necessary to maintain an Action for Trespass 284
„ 138. Trespassers *ab initio* 286
„ 139. Conversion and Detention 286
„ 140. Waiver of Tort 289
„ 141. Trespass and Conversion by Joint Owners 290
„ 142. Remedy by Recaption... 290
„ 143. Remedy by Action of Replevin 291
„ 144. Orders for Restitution of Stolen Goods 291

INDEX.

TABLE OF STATUTES.

		PAGE
4 Edw. 3, c. 7.	(Administration of Estates, 1330)	70
25 Edw. 3, c. 5.	(Administration of Estates, 1351)	70
21 Hen. 8, c. 11.	(Restitution of Goods Stolen, 1529)	283
21 Jac. 1, c. 16.	(Limitation Act, 1623)	93—96
	s. 3	93, 272
	s. 7	97
31 Car. 2, c. 2.	(Habeas Corpus Act, 1679)	254
11 Geo. 2, c. 19.	(Distress for Rent Act, 1737), ss. 19, 20 ...	270
17 Geo. 2, c. 38.	(Poor Relief Act, 1743), s. 8	270
24 Geo. 2, c. 44.	(Constable, 1751), s. 6	259
14 Geo. 3, c. 78.	(Fires Prevention (Metropolis) Act, 1774)—	
	s. 86	200
56 Geo. 3, c. 100.	(Habeas Corpus Act, 1816)	254
5 Geo. 4, c. 83.	(Vagrancy Act, 1824)	263
9 Geo. 4, c. 14.	(Statute of Frauds Amendment Act, 1828)—	
	s. 6	53, 163
2 & 3 Will. 4, c. 71.	(Prescription Act, 1832) 233, 234, 244	
	ss. 3, 4	242, 243
3 & 4 Will. 4, c. 27.	(Real Property Limitation Act, 1833)—	
	s. 2	276
	ss. 3, 10, 11	277
	s. 16	97, 276
	ss. 17, 29	276
	s. 34	96
c. 42.	(Civil Procedure Act, 1833), s. 2	69
2 & 3 Vict. c. 47.	(Metropolitan Police Act, 1839), s. 54 (1) ...	16
c. 93.	(County Police Act, 1839), s. 8	261
3 & 4 Vict. c. 9.	(Parliamentary Papers Act, 1840)—	
	ss. 1, 2	121, 127
	s. 3	127
6 & 7 Vict. c. 86.	(London Hackney Carriages Act, 1843) ...	57
c. 96.	(Libel Act, 1843), ss. 1, 2	129
8 & 9 Vict. c. 20.	(Railways Clauses Consolidation Act, 1845) ...	210
	s. 154	264
c. 75.	(Libel Act, 1845), s. 2	129
9 & 10 Vict. c. 93.	(Fatal Accidents Act, 1846) ... 29, 46, 73, 75,	93, 99
	s. 1 ... ...71, 72	
	ss. 2, 3, 4	72

		PAGE
11 & 12 Vict. c. 44.	(Justices Protection Act (Jervis' Act), 1848)—	
	s. 1	23
14 & 15 Vict. c. 19.	(Criminal Law Act, 1851), s. 11	263
15 & 16 Vict. c. 76.	(Common Law Procedure Act, 1852) Sched. B. :	7
20 & 21 Vict. c. 85.	(Matrimonial Causes Act, 1857), s. 26 ...	52
24 & 25 Vict. c. 96.	(Larceny Act, 1861)—	
	s. 23	273
	s. 100...	291
c. 97.	(Malicious Damage Act, 1861)...	263
c. 100.	(Offences against the Person Act, 1861)—	
	ss. 42—45	264
27 & 28 Vict. c. 95.	(Administration of Estates Act, 1864), s. 1 ...	72
28 & 29 Vict. c. 60.	(Dogs Act, 1865)	197
33 & 34 Vict. c. 23.	(Forfeiture Act, 1870), ss. 8, 30	45
34 & 35 Vict. c. 31.	(Trade Unions Act, 1871)	48
36 & 37 Vict. c. 66.	(Judicature Act, 1873)	274
	s. 25 (8)	89
37 & 38 Vict. c. 57.	(Real Property Limitation Act, 1874)—	
	s. 1	276
	s. 2	277
	ss. 3, 4	276
	s. 5	97, 276
	s. 9	96
39 & 40 Vict. c. 22.	(Trade Unions Act, 1876)	48
41 & 42 Vict. c. 16.	(Factory and Workshop Act, 1878)	208
43 & 44 Vict. c. 42.	(Employers' Liability Act, 1880) ...	203, 209. 211, 212, 216
	s. 4	93
45 & 46 Vict. c. 50.	(Municipal Corporations Act, 1882), s. 191 ...	261
c. 75.	(Married Women's Property Act, 1882):	51, 52, 97
	s. 1	...45. 51
	s. 12	...45, 46
	ss. 13—15	51
	s. 17	46
46 & 47 Vict. c. 52.	(Bankruptcy Act, 1883) ss. 30 (2), 37... ...	71
48 & 49 Vict. c. 69.	(Criminal Law Amendment Act, 1885), s. 10...	134
51 & 52 Vict. c. 43.	(County Courts Act, 1888)—	
	s. 116...	37
	ss. 134—137	291
c. 64.	(Law of Libel Amendment Act, 1888) ...	129
	s. 3	122
	s. 4	128
	s. 6	129
53 & 54 Vict. c. 39.	(Partnership Act, 1890)—	
	s. 10	50, 52, 53
	s. 11	52
	s. 12	...50, 53
c. 64.	(Directors' Liability Act, 1890), ss. 3, 4, 5 ...	166
54 & 55 Vict. c. 51.	(Slander of Women Act, 1891) ...	109, 110

		PAGE
54 & 55 Vict. c. 76.	(Public Health (London) Act, 1891), s. 29 ...	33
56 & 57 Vict. c. 61.	(Public Authorities Protection Act, 1893) ...	98, 99
c. 71.	(Sale of Goods Act, 1893)—	
	ss. 21—23	282
	s. 24	282, 283
	s. 25 (2)	282
60 & 61 Vict. c. 37.	(Workmen's Compensation Act, 1897) ...	211
63 & 64 Vict. c. 22.	(Workmen's Compensation Act, 1900) ...	211
3 Edw. 7, c. 36.	(Motor Car Act, 1903)	264
c. 42.	(County Courts Act, 1903), s. 3	37
5 Edw. 7, c. 11.	(Railway Fires Act, 1905)	202
6 Edw. 7, c. 32.	(Dogs Act, 1906)	196
	s. 1 (1)	196
	s. 7	197
c. 47.	(Trade Disputes Act, 1906)	49, 154
	s. 1	157
	ss. 3, 4	154
c. 58.	(Workmen's Compensation Act, 1906) ...	203, 211, 212, 214
	s. 1	212
	(2)	215, 216
	s. 8	213
	s. 9	215
	s. 13	213, 215
	Sched. I.	213, 215
8 Edw. 7, c. 7.	(Fatal Accidents Act, 1908)	75
c. 69.	(Companies (Consolidation) Act, 1908), s. 84 :	166
9 Edw. 7, c. 44.	(Housing, Town Planning, etc., Act, 1909)—	
	ss. 14, 15	172

TABLE OF CASES CITED.

A.

PAGE

A. *v.* B. (1889), 24 L. R. Ir. 234 ; *sub nom.* S. *v.* S., 16 Cox C. C. 566 : 30
Abrath *v.* North Eastern Rail. Co. (1886), 11 App. Cas. 247 ; 50 J. P. 659 ; 55 L. J. Q. B. 457 ; 55 L. T. 63 ... ... 48, 135, 138
Adams *v.* Lancashire and Yorkshire Rail. Co. (1869), L. R. 4 C. P. 739 ; 38 L. J. C. P. 277 ; 20 L. T. 850 ; 17 W. R. 884... ... 188
Adamson *v.* Jarvis (1827), 4 Bing. 66 ; 5 L. J. (O.S.) C. P. 68 ; 12 Moore C. P. 241 ; 29 R. R. 503... 50
Agency Co. *v.* Short (1888), 13 App. Cas. 793 ; 53 J. P. 132 ; 58 L. J. P. C. 4 ; 59 L. T. 677 ; 37 W. R. 433 96
Alabaster *v.* Harness, [1895] 1 Q. B. 339 ; 64 L. J. Q. B. 76 ; 14 R. 54 ; 71 L. T. 740 ; 43 W. R. 196 [C. A.] 144
Aldin *v.* Latimer, Clark, Muirhead & Co., [1894] 2 Ch. 437 ; 63 L. J. Ch. 601 ; 71 L. T. 119 ; 42 W. R. 453 ; 8 R. 352 243
Aldred *v.* Constable (1844), 6 Q. B. 370 ; 8 Jur. 956 281
Alexander *v.* Jenkins, [1892] 1 Q. B. 797 ; 56 J. P. 452 ; 61 L. J. Q. B. 634 ; 66 L. T. 391 ; 40 W. R. 546 112
Allbutt *v.* General Medical Council of Education and Registration (1889), 23 Q. B. D. 400 ; 54 J. P. 36 ; 58 L. J. Q. B. 606 ; 61 L. T. 585 ; 37 W. R. 771 [C. A.] 128
Allen *v.* Flood, [1898] A. C. 1 ; 62 J. P. 595 ; 67 L. J. Q. B. 119 ; 77 L. T. 717 ; 46 W. R. 258 ... ... 14, 15, 154, 156
—— *v.* New Gas Co. (1876), 1 Ex. D. 251 ; 45 L. J. Ex. 668 ; 34 L. T. 541 204
—— *v.* Woods (1893), 68 L. T. 143 ; 4 R. 249 [C. A.] 276
Allsop *v.* Allsop (1860), 29 L. J. Ex. 315 ; 2 L. T. 290 ; 8 W. R. 449 ; 5 H. & N. 534 ; 6 Jur. (N.S.) 433 109
Ambler *v.* Gordon, [1905] 1 K. B. 417 ; 74 L. J. K. B. 185 ; 92 L. T. 96 ; 53 W. R. 300 245
Anderson *v.* Gorrie, [1895] 1 Q. B. 668 ; 71 L. T. 382 ; 14 R. 79 [C. A.] 21, 22
———— *v.* Oppenheimer (1880), 5 Q. B. D. 602 ; 49 L. J. Q. B. 708 [C. A.] 195
———— *v.* Radcliffe (1858), El. Bl. & El. 806 ; 29 L. J. Q. B. 128 ; 1 L. T. 487 ; 8 W. R. 283 ; 6 Jur. (N.S.) 578 271
Andrew *v.* Failsworth Industrial Society, [1904] 2 K. B. 32 ; 68 J. P. 409 ; 73 L. J. K. B. 511 ; 90 L. T. 611 ; 52 W. R. 451 ; 20 T. L. R. 429 [C. A.] 214
Appleby *v.* Franklin (1885), 17 Q. B. D. 93 ; 50 J. P. 359 ; 55 L. J. Q. B. 129 ; 54 L. T. 135 ; 34 W. R. 231 29
Arkwright *v.* Newbold (1881), 17 Ch. D. 301 ; 50 L. J. Ch. 372 ; 44 L. T. 393 ; 29 W. R. 655 162
Armory *v.* Delamirie (1722), 1 Str. 505 ; 1 Sm. L. C. 356 ... 80, 288
Arnold *v.* Blaker (1871), L. R. 6 Q. B. 433 ; 40 L. J. Q. B. 185 ; 19 W. R. 1090 219

PAGE

Ashby *v.* White (1703), 2 Lord Raymond, 938; 3 Lord Raymond, 320; 1 Sm. L. C. 240; 14 How. St. Tr. 695 238
Asher *v.* Whitlock (1865), L. R. 1 Q. B. 1; 35 L. J. Q. B. 17; 13 L. T. 254; 14 W. R. 26; 11 Jur. (N.S.) 925 ... 270, 274, 275
Ashton *v.* Stock (1877), 6 Ch. D. 719; 25 W. R. 862 277
Aspden *v.* Seddon (1875), L. R. 10 Ch. 394; 44 L. J. Ch. 359; 32 L. T. 415; 23 W. R. 580 239
Atkinson *v.* Newcastle Water Co. (1877), 2 Ex. D. 441; 46 L. J. Ex. 775; 36 L. T. 761; 25 W. R. 794 [C. A.] 33
Att.-Gen. *v.* Birmingham Town Council (1858), 6 W. R. 811; 4 K. & J. 528 ... ... 90, 218
——— *v.* Brighton and Hove Co-operative Supply Association, [1900] 1 Ch. 276; 69 L. J. Ch. 204; 81 L. T. 762; 48 W. R. 314 [C. A.] 218
——— *v.* Cole & Son, [1901] 1 Ch. 205; 65 J. P. 88; 70 L. J. Ch. 148; 83 L. T. 725 229
——— *v.* Conduit Colliery Co., [1895] 1 Q. B. 301; 59 J. P. 70; 64 L. J. Q. B. 207; 71 L. T. 777; 43 W. R. 366; 15 R. 267 [C. A.]... 239
——— *v.* Dorking Union Guardians (1882), 20 Ch. D. 595; 51 L. J. Ch. 585; 46 L. T. 573; 30 W. R. 579 [C. A.] 89
——— *v.* Horner (1886), 11 App. Cas. 66; 50 J. P. 564; 55 L. J. Q. B. 193; 54 L. T. 281; 34 W. R. 641 ... 219
——— *v.* London and North Western Railway, [1900] 1 Q. B. 78; 63 J. P. 772; 69 L. J. Q. B. 26; 81 L. T. 649 [C. A.] 91
——— *v.* Luton Local Board (1859), 2 Jur. (N.S.) 180 218
——— *v.* Manchester Corporation, [1893] 2 Ch. 87; 57 J. P. 343; 62 L. J. Ch. 459; 68 L. T. 608; 41 W. R. 459; 3 R. 427 26
——— *v.* Tod Heatley, [1897] 1 Ch. 560; 66 L. J. Ch. 275; 76 L. T. 174; 45 W. R. 394 [C. A.] 218, 223
Austin *v.* Dowling (1870), L. R. 5 C. P. 534; 39 L. J. C. P. 260; 22 L. T. 721; 18 W. R. 1003 ... ... 257, 258
——— *v.* Great Western Rail. Co. (1867), L. R. 2 Q. B. 442; 36 L. J. Q. B. 201; 16 L. T. 320; 15 W. R. 863 171
Australian Newspaper Co. *v.* Bennett, [1894] A. C. 284; 58 J. P. 604; 63 L. J. P. C. 105; 70 L. T. 597; 6 R. 484 107
Ayre *v.* Craven (1834), 4 L. J. K. B. 35; 2 Ad. & Ell. 2; 4 N. & M. 220; 41 R. R. 359 112

B.

Backhouse *v.* Bonomi (1861), 34 L. J. Q. B. 181; 4 L. T. 754; 9 W. R. 769; 9 H. L. Cas. 503; 7 Jur. (N.S.) 809 ... 94, 95, 238
Baddeley *v.* Granville (Earl) (1887), 19 Q. B. D. 423; 51 J. P. 822; 56 L. J. Q. B. 501; 57 L. T. 268; 36 W. R. 63 190
Baily & Co. *v.* Clark, Son, and Moreland, [1902] 1 Ch. 649; 71 L. J. Ch. 396; 86 L. T. 309; 50 W. R. 511 [C. A.]... ... 246
Bainbridge *v.* Postmaster-General, [1906] 1 K. B. 178; 75 L. J. K. B. 366; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70 [C. A.] ... 62
Baker *v.* Snell, [1908] 2 K. B. 825; 77 L. J. K. B. 1090; 24 T. L. R. 811; 52 Sol. J. 681 [C. A.] 193, 196, 197, 199, 200
Baldwin *v.* Casella (1872), L. R. 7 Ex. 325; 41 L. J. Ex. 167; 26 L. T. 707; 21 W. R. 16... 197
Ball, *Ex parte*, Shepherd, *Re* (1879), 10 Ch. D. 667; 48 L. J. Bkcy. 57; 40 L. T. 141; 27 W. R. 563; 14 Cox C. C. 237 [C. A.] ...29, 30

PAGE
Ball *v.* Ray (1873), L. R. 8 Ch. 467 ; 28 L. T. 346 ; 21 W. R. 282 ... ... 227, 229
Ballard *v.* Tomlinson (1885), 29 Ch. D. 115 ; 49 J. P. 692 ; 54 L. J. Ch. 454 ; 52 L. T. 942 ; 33 W. R. 533... ... ...192, 246, 247
Bamfield *v.* Goole and Sheffield Transport Co., Limited, [1910] 2 K. B. 94 ; 79 L. J. K. B. 1070 ; 103 L. T. 201 [C. A.] ... 189
Bamford *v.* Turnley (1862), 3 B. & S. 62 ; 31 L. J. Q. B. 286 ; 10 W. R. 803 ; 9 Jur. (N.S.) 377 228
Barber *v.* Penley, [1893] 2 Ch. 447 ; 62 L. J. Ch. 623 ; 68 L. T. 662 ; 3 R. 489 227
Barker *v.* Furlong, [1891] 2 Ch. 172 ; 60 L. J. Ch. 368 ; 64 L. T. 411 ; 39 W. R. 621 288
——— *v.* Herbert, [1911] 2 K. B. 633 ... ... 223, 224
Barley *v.* Walford (1846), 9 Q. B. 197; 15 L. J. Q. B. 369 ; 10 Jur. 917 ; 72 R. R. 218 161
Barnardiston *v.* Chapman (1715), cited 4 East, 121 ; Bul. N. P. 34 : 290
Barnes *v.* Ward (1850), 9 C. B. 392 ; 19 L. J. C. P. 195 ; 2 Car. & K. 661 ; 14 Jur. 334... ... ... 218, 220
Barratt *v.* Kearns, [1905] 1 K. B. 504 ; 74 L. J. K. B. 318 ; 92 L. T. 255 ; 53 W. R. 356 ; 21 T. L. R. 212 [C. A.] 122
Bartlett *v.* Wells (1862), 1 B. & S. 836 ; 31 L. J. Q. B. 57 ; 5 L. T. 607 ; 10 W. R. 229 ; 8 Jur. (N.S.) 762 47
Barton's-hill Coal Co. *v.* Reid (1858), 6 W. R. 664 ; 4 Jur. (N.S.) 767 ; 3 Macq. H. L. Ca. 266 206
Barwick *v.* English Joint Stock Bank (1867), L. R. 2 Ex. 259 ; 36 L. J. Ex. 147 ; 16 L. T. 461 ; 15 W. R. 877 ... .. 58, 165
Basèbè *v.* Matthews (1867), L. R. 2 C. P. 684 ; 36 L. J. M. C. 93 ; 16 L. T. 417 ; 15 W. R. 839 ... ... 138, 139
Bass *v.* Gregory (1890), 25 Q. B. D. 481 ; 55 J. P. 119 ; 59 L. J. Q. B. 574 ... ... 243, 244
Bathurst (Borough) *v.* Macpherson (1879), 4 App. Cas. 256 ; 48 L. J. P. C. 61 ; 41 L. T. 778 34
Battersea (Lord) *v.* City of London Sewers Commissioners, [1895] 2 Ch. 708 ; 59 J. P. 728 ; 65 L. J. Ch. 81 ; 73 L. T. 116 ; 44 W. R. 124 ; 13 R. 795 244
Battishill *v.* Reed (1856), 18 C. B. 696 ; 25 L. J. C. P. 290... ... 227
Baxter *v.* Taylor (1833), 2 L. J. K. B. 65 ; 4 B. & Ad. 72 ; 1 N. & M. 13 ; 38 R. R. 227... 234
Bayley *v.* Manchester, Sheffield and Lincolnshire Rail. Co. (1872), L. R. 7 C. P. 415 ; 41 L. J. C. P. 278 60
Beard *v.* London General Omnibus Co., [1900] 2 Q. B. 530 ; 69 L. J. Q. B. 895 ; 83 L. T. 362 ; 48 W. R. 658 [C. A.] ... 58
Beasley *v.* Roney, [1891] 1 Q. B. 509 ; 55 J. P. 566 ; 60 L. J. Q. B. 408 ; 65 L. T. 153 ; 39 W. R. 415... 45
Beaver *v.* Manchester Corporation (1857), 8 El. & Bl. 44 ; 26 L. J. Q. B. 311 ; 4 Jur. (N.S.) 23... 268
Beck *v.* Pierce (1889), 23 Q. B. D. 316 ; 54 J. P. 198 ; 58 L. J. Q. B. 516 ; 61 L. T. 448 ; 38 W. R. 29 [C. A.] 52
Beckham *v.* Drake (1849), 2 H. L. Cas. 579 ; 13 Jur. 921 ... ...70, 71
Beckwith *v.* Philby (1827), 5 L. J. (O.S.) M. C. 132 ; 6 B. & C. 635 ; 9 D. & R. 487 ; 30 R. R. 484 260
Bedford *v.* M'Kowl (1800), 3 Esp. 119... 150
Bedingfield *v.* Onslow (1685), 3 Lev. 209 234
Belfast Ropeworks Co. *v.* Boyd (1888), 21 L. R. Ir. 560 [C. A.] ... 247
Bell *v.* Stone (1798), 1 B. & P. 331 ; 4 R. R. 820 106
Bellamy *v.* Wells (1890), 60 L. J. Ch. 156 ; 63 L. T. 635 ; 39 W. R. 158 227
Benjamin *v.* Storr (1874), L. R. 9 C. P. 400 ; 43 L. J. C. P. 162 ; 30 L. T. 362 ; 22 W. R. 631 220

PAGE
Bennett *v.* Alcott (1787), 2 T. R. 166 148
Bernina, The, Mills *v.* Armstrong (1888), 13 App. Cas. 1 ; 52 J. P. 212 ; 57 L. J. P. 65 ; 58 L. T. 423 ; 36 W. R. 870 ; 6 Asp. M. C. 257 ... ... 183, 184
Berringer *v.* Great Eastern Rail. Co. (1879), 4 C. P. D. 163 ; 48 L. J. C. P. 400 ; 27 W. R. 681 ... ... 73, 145
Besozzi *v.* Harris (1858), 1 F. & F. 92 196
Betts *v.* Gibbins (1834), 2 A. & E. 57 ; 4 L. J. K. B. 1 ; 41 R. R. 381 ; 4 N. & M. 64 50
Bird *v.* Holbrook (1828), 6 L. J. (o.s.) C. P. 146 ; 4 Bing. 628 ; 1 Moo. & P. 607 ; 29 R. R. 657 ... ... 174, 175
—— *v.* Jones (1845), 7 Q. B. 743 ; 15 L. J. Q. B. 82 ; 9 Jur. 870 ; 68 R. R. 564 253
Birmingham Corporation *v.* Allen (1877), 6 Ch. D. 284 ; 46 L. J. Ch. 673 ; 37 L. T. 207 ; 25 W. R. 810 [C. A.] 238, 239
Birmingham Vinegar Brewery Co. *v.* Powell, [1897] A. C. 710 ; 66 L. J. Ch. 763 ; 76 L. T. 792 ... ... 158, 159
Black *v.* Christchurch Finance Co., [1894] A. C. 48 ; 58 J. P. 332 ; 63 L. J. P. C. 32 ; 70 L. T. 77 ; 6 R. 394 ... ... 67, 201
Blades *v.* Higgs (1861), 10 C. B. (N.S.) 713 ; 30 L. J. C. P. 347 ; 4 L. T. 551 ; 7 Jur. (N.S.) 1289 ; affirmed 11 H. L. Cas. 621 ; 20 C. B. (N.S.) 214 ; 34 L. J. C. P. 286 ; 12 L. T. 615 ; 13 W. R. 927 ; 11 Jur. (N.S.) 701 290
Blair and Sumner *v.* Deakin, Eden and Thwaites *v.* Deakin (1887), 52 J. P. 327 ; 57 L. T. 522 49
Blake *v.* Lanyon (1795), 6 T. R. 221 ; 3 R. R. 162 145
—— *v.* Midland Rail. Co. (1852), 18 Q. B. 93 ; 21 L. J. Q. B. 233 ; 16 Jur. 562 74
Bliss *v.* Hall (1838), 7 L. J. C. P. 122 ; 4 Bing. N. C. 183 ; 5 Scott, 500 ; 6 D. P. C. 442 ; 1 Arn. 19 ; 2 Jur. 110 ; 44 R. R. 697 ... 230
Blofield *v.* Payne (1833), 2 L. J. K. B. 68 ; 4 B. & Ad. 410 ; 1 N. & M. 353 158
Bloodworth *v.* Gray (1844), 7 Man. & G. 334 ; 8 Sco. N. R. 9 ; 66 R. R. 720 ... ... 109, 111
Blyth *v.* Birmingham Water Co. (1856), 25 L. J. Ex. 212 ; 11 Ex. 781 ; 4 W. R. 294 ; 2 Jur. (N.S.) 333 167
—— *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337 ; 60 L. J. Ch. 66 ; 63 L. T. 546 ; 39 W. R. 422 53
Boden *v.* Roscoe, [1894] 1 Q. B. 608 ; 58 J. P. 368 ; 63 L. J. Q. B. 767 ; 70 L. T. 450 ; 42 W. R. 445 ; 10 R. 173 273
Bonnard *v.* Perryman, [1891] 2 Ch. 269 ; 60 L. J. Ch. 617 ; 65 L. T. 506 ; 39 W. R. 435 [C. A.] 88, 90
Booth *v.* Arnold, [1895] 1 Q. B. 571 ; 59 J. P. 215 ; 64 L. J. Q. B. 443 ; 72 L. T. 310 ; 43 W. R. 360 ; 14 R. 326 [C. A.] ... 109, 112
Bottomley *v.* Brougham, [1908] 1 K. B. 584 ; 77 L. J. K. B. 311 ; 99 L. T. 111 ; 24 T. L. R. 262 ; 52 Sol. J. 225 ... ... 120, 122
Bound *v.* Lawrence, [1892] 1 Q. B. 226 ; 56 J. P. 118 ; 61 L. J. M. C. 21 ; 65 L. T. 844 ; 40 W. R. 1 [C. A.] 211
Bowen *v.* Anderson, [1894] 1 Q. B. 164 ; 42 W. R. 236 ; 10 R. 47 ... 222
—— *v.* Hall (1881), 6 Q. B. D. 333 ; 45 J. P. 373 ; 50 L. J. Q. B. 305 ; 44 L. T. 75 ; 29 W. R. 367 [C. A.] 154
Bower *v.* Peate (1876), 1 Q. B. D. 321 ; 45 L. J. Q. B. 446 ; 35 L. T. 321 66
Bowyer *v.* Cook (1847), 4 C. B. 236 272
Box *v.* Jubb (1879), 4 Ex. D. 76 ; 48 L. J. Ex. 417 ; 41 L. T. 97 ; 27 W. R. 415 194

PAGE

Boxsius *v.* Goblet Frères, [1894] 1 Q. B. 842; 58 J. P. 670; 63 L. J. Q. B. 401; 70 L. T. 368: 42 W. R. 392; 9 R. 224 [C. A.] 127

Boyle *v.* Tamlyn (1827), 5 L. J. (O.S.) K. B. 134; 6 B. & C. 329; 9 Dow. & R. 430; 30 R. R. 345 199

Bradburn *v.* Great Western Rail. Co. (1874), L. R. 10 Ex. 1; 44 L. J. Ex. 9; 31 L. T. 464; 23 W. R. 468 85

Bradford Corporation *v.* Ferrand, [1902] 2 Ch. 655; 67 J. P. 21; 71 L. J. Ch. 859; 87 L. T. 388; 51 W. R. 122 ... ... 246, 247

——— *v.* Pickles, [1895] A. C. 587; 60 J. P. 3; 64 L. J. Ch. 759; 73 L. T. 353; 44 W. R. 190; 11 R. 286: 14, 15, 225, 226, 247

Bradlaugh *v.* Newdigate (1883), 11 Q. B. D. 1; 52 L. J. Q. B. 454; 31 W. R. 792... ... ... 143, 144

Brassington *v.* Llewellyn (1858), 27 L. J. Ex. 297 276

Brewer *v.* Dew (1843), 12 L. J. Ex. 448; 11 M. & W. 625; 1 D. & L. 383; 7 Jur. 953; 63 R. R. 690 ... ... 70, 71

——— *v.* Sparrow (1827), 6 L. J. (O.S.) K. B. 1; 7 B. & C. 310; 1 Man. & R. 2 289

Brinsmead *v.* Harrison (1871), L. R. 6 C. P. 584; 40 L. J. C. P. 281; 24 L. T. 798; 19 W. R. 956 ... 287

——— *v.* ——— (1872), L. R. 7 C. P. 547; 41 L. J. C. P. 190; 27 L. T. 99; 20 W. R. 784... ... ... 49, 50

British Cash and Parcel Conveyers, Limited *v.* Lamson Store Service Co., Limited, [1908] 1 K. B. 1006; 77 L. J. K. B. 649; 98 L. T. 875 [C. A.] 144

British Mutual Banking Co. *v.* Charnwood (1887), 18 Q. B. D. 714; 52 J. P. 150; 56 L. J. Q. B. 449; 57 L. T. 833; 35 W. R. 590 [C. A.] 59

British South Africa Co. *v.* Companhia de Moçambique, [1893] A. C. 602; 63 L. J. Q. B. 70; 69 L. T. 604; 6 R. 1 44

Britton *v.* South Wales Rail. Co. (1858), 27 L. J. Ex. 355 77

Brocklebank *v.* Thompson, [1903] 2 Ch. 344; 72 L. J. Ch. 626; 89 L. T. 209 248

Bromage *v.* Prosser (1825), 3 L. J. (O.S.) K. B. 203; 4 B. & C. 247; 6 Dow. & R. 296; 1 Car. & P. 475; 24 R. R. 241 14

Brown *v.* Boorman (1844), 3 Q. B. 511; 11 Cl. & F. 1; 65 R. R. 1... 37

——— *v.* Hawkes, [1891] 2 Q. B. 718; 55 J. P. 823; 61 L. J. Q. B. 151; 65 L. T. 108 [C. A.] 137, 138

——— *v.* Robins (1859), 4 H. & N. 186; 28 L. J. Ex. 250 241

Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141; 49 J. P. 4; 53 L. J. Q. B. 476; 51 L. T. 529; 32 W. R. 944 [C. A.]... 82

Brunswick (Duke) *v.* Hanover (King) (1844), 13 L. J. Ch. 107; 6 Beav. 1; 8 Jur. 253; 63 R. R. 1... 46

Bryant *v.* Lefever (1879), 4 C. P. D. 172; 48 L. J. C. P. 380; 40 L. T. 579; 27 W. R. 592 ... ... 243, 244

Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351; 68 L. J. P. C. 49; 80 L. T. 430; 47 W. R. 545 94

Burgess *v.* Burgess (1853), 22 L. J. Ch. 675; 3 De G. M. & G. 896; 17 Jur. 292 158

Burnard *v.* Haggis (1863), 14 C. B. (N.S.) 45; 32 L. J. C. P. 189; 8 L. T. 320; 11 W. R. 644; 9 Jur. (N.S.) 1325 47

Burr *v.* Smith, [1909] 2 K. B. 306; 78 L. J. K. B. 889; 101 L. T. 194; 25 T. L. R. 542; 53 Sol. J. 502; 16 Manson, 210 [C. A.]... 122

—— *v.* Theatre Royal, Drury Lane, Limited, [1907] 1 K. B. 544; 76 L. J. K. B. 459; 96 L. T. 447; 23 T. L. R. 299 [C. A.]: 205, 206

Burrows *v.* March Gas and Coke Co. (1872), L. R. 7 Ex. 96; 41 L. J. Ex. 46; 26 L. T. 318; 20 W. R. 493 19

PAGE

Burton *v.* Hughes (1824), 3 L. J. C. P. 243 ; 2 Bing. 173 ; 9 Moore, 334 289
Butcher *v.* Butcher (1827), 6 L. J. (O.S.) K. B. 51 ; 7 B. & C. 399 ; 1 Man. & R. 220 ; 31 R. R. 237 271
Butterfield *v.* Forrester (1809), 11 East, 60 ; 10 R. R. 433 ... 182, 184
Byne *v.* Moore (1813), 5 Taunt. 187 ; 1 Marsh. 12 139
Byrne *v.* Boadle (1863), 33 L. J. Ex. 13 ; 9 L. T. 450 ; 12 W. R. 279 ; 2 H. & C. 722 ... ... 185, 186

C.

Cable *v.* Bryant, [1908] 1 Ch. 259 ; 77 L. J. Ch. 78 ; 98 L. T. 98 : 243, 244
Cahill *v.* Fitzgibbon (1885), 16 L. R. Ir. 371 260
Calder *v.* Halket (1840), 3 Moo. P. C. C. 28 ; 50 R. R. 1 22
Caledonian Rail. Co. *v.* Mulholland, [1898] A. C. 216 ; 67 L. J. P. C. 1 ; 77 L. T. 570 ; 46 W. R. 236 ... ... 167, 168
Calye's Case (1584), 1 Sm. L. C. 119 177
Campbell *v.* Spottiswoode (1863), 3 B. & S. 769 ; 32 L. J. Q. B. 185 ; 8 L. T. 201 ; 11 W. R. 569 ; 9 Jur. (N.S.) 1069 120
Cannon *v.* Rimington (1852), 12 C. B. 1 ; 21 L. J. C. P. 137 ... 277
Capel *v.* Powell (1864), 17 C. B. (N.S.) 743 ; 34 L. J. C. P. 168 ; 11 L. T. 421 ; 13 W. R. 159 ; 10 Jur. (N.S.) 1255 52
Capital and Counties Bank *v.* Henty (1882), 7 App. Cas. 741 ; 47 J. P. 214 ; 52 L. J. Q. B. 232 ; 47 L. T. 662 ; 31 W. R. 157 : 103, 105—107, 124
Carlyon *v.* Lovering (1857), 26 L. J. Ex. 251 ; 5 W. R. 347 ; 1 H. & N. 784 248
Carpue *v.* London and Brighton Co. (1844), 5 Q. B. 747 ; 13 L. J. Q. B. 138 ; Dav. & M. 608 ; 3 Rail. Cas. 692 ; 8 Jur. 464 ... 186
Carr *v.* Clarke (1818), 2 Chit. 260 ; 23 R. R. 748 148
—— *v.* Fracis Times & Co., [1902] A. C. 176 ; 71 L. J. K. B. 361 ; 50 W. R. 257 ... ... 43, 44
Carslake *v.* Mappledoram (1788), 2 T. R. 473 111
Carstairs *v.* Taylor (1871), L. R. 6 Ex. 217 ; 40 L. J. Ex. 129 ; 19 W. R. 723 195
Carter *v.* St. Mary Abbots, Kensington Vestry (1900), 64 J. P. 548 [C. A.] 55
Castrique *v.* Behrens (1861), 3 El. & El. 709 ; 30 L. J. Q. B. 163 ; 4 L. T. 52 ; 7 Jur. (N.S.) 1028 139
Cavalier *v.* Pape, [1906] A. C. 428 ; 75 L. J. K. B. 609 ; 95 L. T. 65 ; 22 T. L. R. 648 ... ... 172, 173
Chamberlain *v.* Boyd (1883), 11 Q. B. D. 407 ; 47 J. P. 372 ; 52 L. J. Q. B. 277 ; 48 L. T. 328 ; 31 W. R. 572 [C. A.] 109
Chaplin (W. H.) & Co., Limited *v.* Westminster Corporation, [1901] 2 Ch. 329 ; 65 J. P. 661 ; 70 L. J. Ch. 679 ; 85 L. T. 88 ; 49 W. R. 586 10
Chapman *v.* Pickersgill (1762), 2 Wils. 146 11
Chasemore *v.* Richards (1859), 29 L. J. Ex. 81 ; 7 W. R. 685 ; 7 H. L. Cas. 349 ; 5 Jur. (N.S.) 873 ... ... 226, 246, 247
Chastey *v.* Ackland, [1895] 2 Ch. 389 ; 64 L. J. Q. B. 523 ; 72 L. T. 845 ; 43 W. R. 627 ; 12 R. 420 [C. A.] 243, 244
Chastey *v.* Ackland, [1897] A. C. 155 ; 66 L. J. Q. B. 518 ; 76 L. T. 430 ... ... 243, 244
Chatterton *v.* Secretary of State for India in Council, [1895] 2 Q. B. 189 ; 59 J. P. 596 ; 64 L. J. Q. B. 676 ; 72 L. T. 858 ; 14 R. 504 121

PAGE
Chauntler *v.* Robinson (1849), 4 Ex. 163 ; 19 L. J. Ex. 170 ... 241
Chinery *v.* Viall (1860), 29 L. J. Ex. 180 ; 2 L. T. 466 ; 8 W. R. 629 ; 5 H. & N. 295 38
Christie *v.* Cowell (1790), Peake, 4 ; 3 R. R. 642 110
Christopherson *v.* Bare (1848), 11 Q. B. 473 ; 17 L. J. Q. B. 109 ; 12 Jur. 374 ... ... 251, 252
Churchill *v.* Siggers (1854), 3 El. & Bl. 929 ; 23 L. J. Q. B. 308 ; 2 W. R. 551 ; 2 C. L. R. 1509 ; 18 Jur. 773 133
Citizens' Life Assurance Co. *v.* Brown, [1904] A. C. 423 ; 73 L. J. P. C. 102 ; 90 L. T. 739 ; 53 W. R. 176 ; 20 T. L. R. 497 ...48, 61
City of Lincoln, The (1889), 15 P. D. 15 ; 59 L. J. P. & D. 1 ; 62 L. T. 49 ; 38 W. R. 345 ; 6 Asp. M. C. 475 [C. A.] ... 82
Clark *v.* Freeman (1848), 17 L. J. Ch. 142 ; 11 Beav. 112 ; 12 Jur. 149 89
—— *v.* London General Omnibus Co., Limited, [1906] 2 K. B. 648 ; 75 L. J. K. B. 907 ; 95 L. T. 435 ; 22 T. L. R. 691 [C. A.] 9, 73, 74, 145
—— *v.* Molyneux (1877), 3 Q. B. D. 237 ; 47 L. J. Q. B. 230 ; 37 L. T. 694 ; 26 W. R. 104 ; 14 Cox C. C. 10 [C. A.] : 123—125
—— *v.* Woods (1848), 17 L. J. M. C. 189 ; 2 Ex. 395 ; 3 New Sess. Cas. 253 24
Clarke *v.* Army and Navy Co-operative Society, [1903] 1 K. B. 155 ; 78 L. J. K. B. 153 ; 88 L. T. 1 [C. A.] 179
Clayards *v.* Dethick (1848), 12 Q. B. 439 28
Cleary *v.* Booth, [1893] 1 Q. B. 465 ; 57 J. P. 375 ; 62 L. J. M. C. 87 ; 68 L. T. 349 ; 41 W. R. 391 ; 5 R. 263 ; 17 Cox C. C. 611 ... 256
Clement *v.* Chivis (1829), 7 L. J. (O.S.) K. B. 189 ; 9 B. & C. 172 ; 4 M. & R. 127 ; 32 R. R. 624 107
Cobbett *v.* Gray (1850), 4 Ex. 729 ; 19 L. J. Ex. 137 251
Cocke *v.* Jennor (1604), Hob. 66 49
Cockroft *v.* Smith (1703), 11 Mod. Rep. 43 255
Coggs *v.* Bernard (1703), 1 Sm. L. C. 173 ; 2 Ld. Raym. 909 ... 40, 41, 176, 177
Coldrick *v.* Partridge, Jones & Co., Limited, [1909] 1 K. B. 530 ; 78 L. J. K. B. 452 ; 100 L. T. 314 ; 25 T. L. R. 218 ; 53 Sol. J. 214 ; affirmed, [1909] W. N. 257 ; 26 T. L. R. 164 ; 54 Sol. J. 132 206
Collis *v.* Laugher, [1894] 3 Ch. 659 ; 63 L. J. Ch. 851 ; 71 L. T. 226 ; 43 W. R. 202 ; 8 R. 760 243
Colls *v.* Home and Colonial Stores, Limited, [1904] A. C. 179 ; 73 L. J. Ch. 484 ; 90 L. T. 687 ; 53 W. R. 30 ; 20 T. L. R. 475 : 89, 243, 244
Consolidated Co. *v.* Curtis & Son, [1892] 1 Q. B. 495 ; 56 J. P. 565 ; 61 L. J. Q. B. 325 ; 40 W. R. 426... 282
Conway *v.* Wade, [1909] A. C. 506 ; 78 L. J. K. B. 1025 ; 101 L. T. 248 ; 25 T. L. R. 779 ; 53 Sol. J. 754 154
Cook *v.* Beal (1697), Ld. Raym. 177 255
—— *v.* North Metropolitan Tramways Co. (1887), 18 Q. B. D. 683 ; 51 J. P. 630 ; 56 L. J. Q. B. 309 ; 56 L. T. 448 ; 57 L. T. 476 ; 35 W. R. 577 211
Cooke *v.* Midland Great Western Rail. Co. of Ireland, [1909] A. C. 229 ; [1909] 2 I. R. 499 ; 78 L. J. C. P. 76 ; 100 L. T. 626 ; 25 T. L. R. 375 ... ... 174, 176, 180, 183
Cooke *v.* Wildes (1855), 5 E. & B. 328 ; 24 L. J. Q. B. 267 ; 3 W. R. 458 ; 3 C. L. R. 1090 ; 1 Jur. (N.S.) 610 123
Cooper *v.* Booth (1785), 3 Esp. 135 ; 4 Dougl. 339 ; 1 T. R. 535 n.... 134
——— *v.* Shepherd (1846), 3 C. B. 266 ; 15 L. J. C. P. 237 ; 4 D. & L. 214 ; 10 Jur. 758 ; 71 R. R. 349 287

PAGE

Cooper *v.* Willomatt (1845), 14 L. J. C. P. 219; 1 C. & B. 672; 9 Jur. 598 ... ... 287, 289
Corby *v.* Hill (1858), 4 C. B. (N.S.) 556; 27 L. J. C. P. 318; 4 Jur. (N.S.) 512; 6 W. R. 575 175
Cornfoot *v.* Fowke (1840), 9 L. J. Ex. 297; 6 M. & W. 358; 4 Jur. 919; 55 R. R. 655 [C. A.] 165
Cornford *v.* Carlton Bank, [1899] 1 Q. B. 392; 68 L. J. Q. B. 196; 80 L. T. 121; [1900] 1 Q. B. 22; 69 L. J. Q. B. 1020; 81 L. T. 415 ... ... 48, 138
Costar *v.* Hetherington (1859), 28 L. J. M. C. 198 265
Cotterell *v.* Jones & Ablett (1851), 11 C. B. 713; 21 L. J. C. P. 2; 16 Jur. 88 139
Coughlin *v.* Gillison, [1899] 1 Q. B. 145; 68 L. J. Q. B. 147; 79 L. T. 627; 47 W. R. 113 [C. A.] 180
Coulson *v.* Coulson (1887), 3 T. L. R. 846 [C. A.] 90
Coward *v.* Baddeley (1859), 28 L. J. Ex. 260; 4 H. & N. 478; 5 Jur. (N.S.) 414; 7 W. R. 466 252
Cowles *v.* Potts (1865), 34 L. J. Q. B. 247; 11 Jur. (N.S.) 946; 13 W. R. 858 126
Cowley *v.* Newmarket Local Board, [1892] A. C. 345; 56 J. P. 805; 62 L. J. Q. B. 65; 67 L. T. 486; 1 R. 45 33
Cox *v.* Burbidge (1863), 13 C. B. (N.S.) 430; 32 L. J. C. P. 89; 11 W. R. 435; 9 Jur. (N.S.) 970 ... ... 196, 198
—— *v.* Glue (1848), 5 C. B. 533; 17 L. J. C. P. 162; 12 Jur. 185... 271
—— *v.* Lee (1869), L. R. 4 Ex. 284; 38 L. J. Ex. 219; 21 L. T. 178 ... ... 106, 107
—— Mousley (1848), 5 C. B. 533 271
Coxhead *v.* Richards (1846), 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 987; 69 R. R. 530 125
Creagh *v.* Gamble (1888), 24 L. R. Ir. 458 261
Cresswell *v.* Hedges (1862), 31 L. J. Ex. 497; 10 W. R. 777; 1 H. & C. 421; 8 Jur. (N.S.) 767 272
Croft *v.* Alison (1821), 4 B. & A. 590; 23 R. R. 407... 59
Crossley & Sons, Limited *v.* Lightowler (1867), L. R. 2 Ch. 478; 36 L. J. Ch. 584; 16 L. T. 438; 15 W. R. 801 ... ...231, 234, 246
Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5; 48 L. J. Ex. 109; 39 L. T. 355; 27 W. R. 95 ... ... 192, 195
Crump *v.* Lambert (1867), L. R. 3 Eq. 409; 15 L. T. 600; 15 W. R. 417 226
Cubitt *v.* Porter (1828), 6 L. J. (O.S.) K. B. 306; 8 B. & C. 257; 2 Man. & R. 267; 32 R. R. 374 272
Cuenod *v.* Leslie, [1909] 1 K. B. 880; 78 L. J. K. B. 695; 100 L. T. 675; 25 T. L. R. 374; 53 Sol. J. 340 [C. A.] 52

D.

Dakhyl *v.* Labouchere, (1907) [1908] 2 K. B. 325 n; 77 L. J. K. B. 728; 96 L. T. 399; 23 T. L. R. 364 120
Dalton *v.* Angus (1881), 6 App. Cas. 740; 46 J. P. 132; 50 L. J. Q. B. 689; 44 L. T. 844; 30 W. R. 191 ... 66, 241, 242
——— *v.* South-Eastern Rail. Co. (1858), 4 C. B. (N.S.) 296; 27 L. J. C. P. 227; 6 W. R. 574; 4 Jur. (N.S.) 711 74
Daly *v.* Dublin, Wicklow, and Wexford Rail. Co. (1892), 30 L. R. Ir. 514 [C. A.] 74
Dand *v.* Sexton (1789), 3 T. R. 37 281
Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127; 51 J. P. 148; 55 L. J. Q. B. 529; 54 L. T. 882... ... 83, 94, 95

PAGE

Dauncey *v.* Holloway, [1901] 2 K. B. 441; 70 L. J. K. B. 695; 84 L. T. 649; 49 W. R. 546 [C. A.] 112
Davey *v.* London and South Western Rail. Co. (1883), 12 Q. B. D. 70; 48 J. P. 279; 53 L. J. Q. B. 58; 49 L. T. 739 [C. A.] ... 186
Davies *v.* Mann (1842), 12 L. J. Ex. 10; 10 M. & W. 549; 6 Jur. 954; 62 R. R. 698 ... ... 182, 221
——— *v.* Snead (1870), L. R. 5 Q. B. 608; 39 L. J. Q. B. 202; 23 L. T. 126 125
——— *v.* Solomon (1871), L. R. 7 Q. B. 112; 41 L. J. Q. B. 10; 25 L. T. 799; 20 W. R. 167 109
——— *v.* Williams (1847), 10 Q. B. 725; 16 L. J. Q. B. 369; 11 Jur. 750; 74 R. R. 491 146
——— *v.* ——— (1851), 16 Q. B. 546; 20 L. J. Q. B. 330; 15 Jur. 752 236
Davis *v.* London and North Western Rail. Co. (1858), 7 W. R. 105; 4 Jur. (N.S.) 1303 83
—— *v.* Russell (1829), 7 L. J. (O.S.) M. C. 52: 5 Bing. 354; 2 M. & P. 590; 30 R. R. 637 261
—— *v.* Shepstone (1886), 11 App. Cas. 187; 50 J. P. 709; 55 L. J. P. C. 51; 55 L. T. 1; 34 W. R. 722 128
Dawkins *v.* Rokeby (Lord) (1875), L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 33 L. T. 196; 23 W. R. 931 122
Dean *v.* Peel (1804), 5 East, 45; 7 R. R. 653; 1 Smith, 333 ... 148
De Crespigny *v.* Wellesley (1829), 7 L. J. (O.S.) C. P. 100; 5 Bing. 392; 30 R. R. 665; 12 M. & P. 695 116
Degg *v.* Midland Rail. Co. (1857), 26 L. J. Ex. 171; 1 H. & N. 773; 3 Jur. (N.S.) 395; 5 W. R. 364 208
Delaney *v.* Fox (1857), 2 C. B. (N.S.) 768; 26 L. J. P. C. 248 ... 275
Derry *v.* Handley (1867), 16 L. T. (N.S.) 263 116
—— *v.* Peeke (1889), 14 App. Cas. 337; 54 J. P. 148; 58 L. J. Ch. 864; 61 L. T. 265: 38 W. R. 33; 1 Mag. 292 ... 162, 166
De Wahl *v.* Braune (1856), 25 L. J. Ex. 343; 1 H. & N. 178 ... 45
C. 735; 9 L. T. 299; 12 W. R. 52 73
Dickenson *v.* North Eastern Rail. Co. (1863), 33 L. J. Ex. 91; 2 H. & C. 735; 9 L. T. 299; 12 W. R. 52 73
Digby *v.* Thompson (1833), 2 L. J. K. B. 140; 4 B. & Ad. 821; 1 N. & M. 485; 38 R. R. 378 104
Dillon *v.* Balfour (1887), 20 L. R. Ir. 600 121
Dimes *v.* Petley (1850), 15 Q. B. 276; 19 L. J. Q. B. 449; 14 Jur. 1132 221
Dixon *v.* Bell (1816), 5 M. & S. 198; 1 Stark. 287; 17 R. R. 308... 81, 175, 179
Dobell *v.* Stevens (1825), 3 L. J. (O.S.) K. B. 89; 3 B. & C. 623; 5 D. & R. 490; 27 R. R. 441 163
Doe *d.* Carter *v.* Bernard (1849), 13 Q. B. 945 275
—— *d.* Johnston *v.* Baytup (1835), 4 L. J. (N.S.) K. B. 263; 3 A. & E. 188; 4 M. & N. 837; 1 H. & W. 270; 42 R. R. 359... 275
—— *d.* Knight *v.* Smythe (1815), 4 M. & S. 347 275
—— *d.* Marriott *v.* Edwards (1834), 5 B. & Ad. 1065; 6 Car. & P. 208; 3 N. & M. 193... 275
—— *d.* Oliver *v.* Powell (1834), 1 A. & E. 531; 3 H. & M. 616 ... 275
—— *d.* Smith *v.* Webber (1834), 3 L. J. (N.S.) K. B. 148; 1 A. & E. 119; 3 H. & N. 746; 40 R. R. 268 274
Dominion Natural Gas Co. *v.* Collins, [1909] A. C. 640; 101 L. T. 359; 25 T. L. R. 831 177
Dominion Natural Gas Co. *v.* Perkins and Others, [1909] A. C. 640; 101 L. T. 359; 25 T. L. R. 831 177

PAGE

Donald *v.* Suckling (1866), L. R. 1 Q. B. 585 ; 35 L. J. Q. B. 232 ; 14 L. T. 772 ; 15 W. R. 13 ; 12 Jur. (N.S.) 795 ; 7 B. & S. 783 288

Donovan *v.* Laing, Wharton and Down Construction Syndicate, [1893] 1 Q. B. 629 ; 57 J. P. 583 ; 63 L. J. Q. B. 25 ; 68 L. T. 512 ; 41 W. R. 455 ; 4 R. 317 [C. A.] 58

Doorman *v.* Jenkins (1834), 4 L. J. K. B. 29 ; 2 A. & E. 256 ; 4 N. & M. 170 ; 41 R. R. 429 ... ... 41, 168

Doswell *v.* Impey (1823), 1 B. & C. 169 21

Dovaston *v.* Payne (1795), 2 H. Bl. 527 ; 2 Sm. L. C. 160 ; 3 R. R. 497 268

Dovey *v.* Cory, [1901] A. C. 477 ; 70 L. J. Ch. 753 ; 85 L. T. 257 ; 50 W. R. 65 ; 17 T. L. R. 732 ; 8 Manson, 346 166

Dublin, Wicklow and Wexford Rail. Co. *v.* Slattery (1878), 3 App. Cas. 1155 ; 39 L. T. 365 ; 27 W. R. 191 ... ...169, 170, 185

Duck *v.* Mayeu, [1892] 2 Q. B. 511 ; 57 J. P. 23 ; 62 L. J. Q. B. 69 ; 67 L. T. 547 ; 41 W. R. 56 ; 4 R. 38 [C. A.] 49

Dulieu *v.* White & Sons, [1901] 2 K. B. 669 ; 70 L. J. K. B. 837 ; 85 L. T. 126 ; 50 W. R. 76 81

Dunn *v.* Birmingham Canal Co. (1872), L. R. 8 Q. B. 42 ; 42 L. J. Q. B. 34 ; 27 L. T. 683 ; 21 W. R. 266 240

Dyer *v.* Munday, [1895] 1 Q. B. 742 ; 59 J. P. 276 ; 64 L. J. Q. B. 448 ; 72 L. T. 448 ; 43 W. R. 440 ; 14 R. 306 [C. A.]... ... 61

E.

Eager *v.* Grimwood (1847), 16 L. J. Ex. 236 ; 1 Ex. 61 ; 74 R. R. 584 151

Earl *v.* Lubbock, [1905] 1 K. B. 253 ; 74 L. J. K. B. 121 ; 53 W. R. 145 [C. A.] 40

Earle *v.* Kingscote, [1900] 1 Ch. 203 51

Eastern and South African Telegraph Co. *v.* Cape Town Tramways Co., [1902] A. C. 381 ; 71 L. J. P. C. 122 ; 86 L. T. 457 ; 50 W. R. 657 192

Eastwood *v.* Holmes (1858), 1 F. & F. 347 113

Eaton *v.* Johns (1842), 1 Dowl. (N.S.) 602 106

Edmondson *v.* Birch & Co., Limited and Horner, [1907] 1 K. B. 371 ; 76 L. J. K. B. 346 ; 96 L. T. 413 ; 23 T. L. R. 234 [C. A.] 115, 127

Edwards *v.* Midland Rail. Co. (1880), 6 Q. B. D. 287 ; 45 J. P. 374 ; 50 L. J. Q. B. 281 ; 43 L. T. 694 ; 29 W. R. 609 48

Ellis *v.* Loftus Iron Co. (1874), L. R. 10 C. P. 10 ; 44 L. J. C. P. 24 ; 31 L. T. 483 ; 23 W. R. 246 ... ... 199, 267

—— *v.* Sheffield Gas Consumers Co. (1853), 2 El. & Bl. 767 ; 23 L. J. Q. B. 42 ; 2 W. R. 19 ; 2 C. L. R. 249 ; 18 Jur. 146 ... ...63, 66

Elwood *v.* Bullock (1844), 6 Q. B. 383 ; 13 L. J. Q. B. 330 ; 8 Jur. 1044 219

Embrey *v.* Owen (1851), 20 L. J. Ex. 212 ; 6 Ex. 353 ; 15 Jur. 633 ; 245, 246

Emmens *v.* Pottle (1885), 16 Q. B. D. 354 ; 50 J. P. 228 ; 55 L. J. Q. B. 51 ; 53 L. T. 808 ; 34 W. R. 116 [C. A.]... ... 47, 117

Engelhart *v.* Farrant & Co., [1897] 1 Q. B. 240 ; 66 L. J. Q. B. 122 ; 75 L. T. 617 ; 45 W. R. 179 [C. A.] 18, 62, 184

Evans *v.* Harries (1856), 26 L. J. Ex. 31 ; 1 H. & N. 251 109

—— *v.* Walton (1867), L. R. 2 C. P. 615 ; 36 L. J. C. P. 307 ; 17 L. T. 92 ; 15 W. R. 1062 ... ... 146—148

Every *v.* Smith (1857), 26 L. J. Ex. 344 271

F.

PAGE
Faldo *v.* Ridge (1604), Yelv. 74 268
Falvey *v.* Standford (1874), L. R. 10 Q. B. 54; 44 L. J. Q. B. 7; 31 L. T. 677; 23 W. R. 162 77
Fenna *v.* Clare & Co., [1895] 1 Q. B. 199; 64 L. J. Q. B. 238; 15 R. 220 219
Fenton *v.* Thorley & Co., Limited, [1903] A. C. 443; 72 L. J. K. B. 787; 89 L. T. 314; 52 W. R. 81; 19 T. L. R. 684 213
Fenwick *v.* East London Rail. Co. (1875), L. R. 20 Eq. 544; 44 L. J. Ch. 602; 23 W. R. 901 89
Filburn *v.* People's Palace and Aquarium Co. (1890), 25 Q. B. D. 258; 55 J. P. 181; 59 L. J. Q. B. 471; 38 W. R. 706 [C. A.]: 196, 198
Filliter *v.* Phippard (1847), 11 Q. B. 347; 17 L. J. Q. B. 89; 12 Jur. 202 ... ... 200, 201
Findon *v.* Parker (1843), 11 M. & W. 675 144
Firth *v.* Bowling Iron Co. (1878), 3 C. P. D. 254; 47 L. J. C. P. 358; 38 L. T. 568; 26 W. R. 558... 192
Fisher *v.* Prowse (1862), 2 B. & S. 770; 31 L. J. Q. B. 212; 6 L. T. 711; 8 Jur. (N.S.) 1208 220
Fitzgerald *v.* Clarke (W. G.) & Son, [1908] 2 K. B. 796; 77 L. J. K. B. 1018; 99 L. T. 101 [C. A.]... 214
Fitzjohn *v.* Mackinder (1861), 9 C. B. (N.S.) 505; 30 L. J. C. P. 257; 4 L. T. 149; 9 W. R. 477; 7 Jur. (N.S.) 1283 134
Fletcher *v.* Rylands (1866), L. R. 1 Ex. 265; affirmed *sub nom.* Rylands *v.* Fletcher (1868), L. R. 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220 ... ... 191—193
——— *v.* Smith (1877), 2 App. Cas. 781; 47 L. J. Ex. 4; 37 L. T. 367; 26 W. R. 83 194
Flight *v.* Thomas (1840), 10 L. J. Ex. 529; 11 A. & E. 688; 3 P. & D. 442; 8 Cl. & F. 231; 52 R. R. 468; 5 Jur. 811 244
Foreman *v.* Canterbury Corporation (1871), L. R. 6 Q. B. 214; 40 L. J. Q. B. 138; 24 L. T. 385; 19 W. R. 719 35
Fores *v.* Wilson (1791), 1 Peake, 55; 3 R. R. 652 147
Foster *v.* Warblington Urban Council, [1906] 1 K. B. 648; 70 J. P. 233; 75 L. J. K. B. 514; 94 L. T. 876; 54 W. R. 575; 22 T. L. R. 421; 4 L. G. R. 735 [C. A.]... 192
Foulger *v.* Newcomb (1867), L. R. 2 Ex. 327; 36 L. J. Ex. 169; 16 L. T. 595; 15 W. R. 1181 109
Fowler *v.* Hollins (1872), L. R. 7 Q. B. 616; 41 L. J. Q. B. 277; 27 L. T. 168; 20 W. R. 868 282
France *v.* Gaudet (1871), L. R. 6 Q. B. 199; 40 L. J. Q. B. 121; 19 W. R. 622 79
Francis *v.* Cockrell (1870), L. R. 5 C. P. 184 174
Franklin *v.* South Eastern Rail. Co. (1858), 6 W. R. 573; 3 H. & N. 211; 4 Jur. (N.S.) 565 74
Fray *v.* Fray (1864), 17 C. B. (N.S.) 603; 34 L. J. C. P. 45; 10 Jur. (N.S.) 1153 104
Fritz *v.* Hobson (1880), 14 Ch. D. 542; 49 L. J. Ch. 735; 42 L. T. 677; 28 W. R. 722 ... ... 10, 220
Fryer *v.* Kynnersly (1863), 15 C. B. (N.S.) 422; 33 L. J. C. P. 96; 9 L. T. 415; 12 W. R. 155; 10 Jur. (N.S.) 441 125
Fulton *v.* Norton, [1908] A. C. 451; 99 L. T. 455; 24 T. L. R. 794... 32

G.

Gallwey *v.* Marshall (1853), 23 L. J. Ex. 78; 9 Ex. 295; 2 C. L. R. 399; 2 W. R. 106 111

PAGE

Gandy *v.* Jubber (1864), 5 B. & S. 78 ; 33 L. J. Q. B. 151 ; 9 L. T. 800 ; 12 W. R. 526 ; 10 Jur. (N.S.) 652 222
Gane *v.* Norton Hill Colliery Co., [1909] 2 K. B. 539 ; 78 L. J. K. B. 921 ; 100 L. T. 979 ; 25 T. L. R. 640 [C. A.] 214
Ganley *v.* Ledwidge (1884), 14 L. R. Ir. 31 [C. A.] 282
Gardener *v.* Slade (1849), 13 Q. B. 796 ; 18 L. J. Q. B. 334 ; 13 Jur. 826 125
Gardner *v.* Hodgson's Kingston Brewery Co., [1903] A. C. 229 ; 72 L. J. Ch. 558 ; 88 L. T. 698 ; 52 W. R. 17 ; 19 T. L. R. 458 233
Garret *v.* Taylor (1620), Cro. Jac. 567 156
Gautret *v.* Egerton (1867), L. R. 2 C. P. 371 ; 36 L. J. C. P. 191 ; 16 L. T. 17 ; 15 W. R. 638 ... ... 171, 173—175
Geddis *v.* Bann Reservoir (Proprietors) (1878), 3 App. Cas. 430 ... 25
Gee *v.* Pritchard (1818), 2 Swan. 402 ; 19 R. R. 87 89
George and Richard, The (1871), L. R. 3 Ad. & Ec. 466 ; 24 L. T. 717 ... ... 46, 73, 188
George *v.* Skivington (1869), L. R. 5 Ex. 1 ; 39 L. J. Ex. 8 ; 21 L. T. 495 ; 18 W. R. 118 ... ... 39, 179
Gibbs *v.* Guild (1882), 9 Q. B. D. 59 ; 51 L. J. Q. B. 313 ; 46 L. T. 248 ; 30 W. R. 591 94
Giblan *v.* National Amalgamated Labourers' Union of Great Britain and Ireland, [1903] 2 K. B. 600 ; 72 L. J. K. B. 907 ; 89 L. T. 386 [C. A.] 157
Gibraltar Sanitary Commissioners *v.* Orfila (1890), 15 App. Cas. 400 ; 59 L. J. P. C. 95 ; 63 L. T. 58 33
Giles *v.* Walker (1890), 24 Q. B. D. 656 ; 54 J. P. 599 ; 59 L. J. Q. B. 416 ; 62 L. T. 933 ; 38 W. R. 782 195
Gilpin *v.* Fowler (1854), 9 Ex. 615 ; 23 L. J. Ex. 152 ; 2 W. R. 272 ; 18 Jur. 292 126
Gladwell *v.* Steggall (1839), 5 Bing. N. C. 733 ... ... 39, 168, 169
Glasgow Corporation *v.* Lorimer, [1911] A. C. 209 ; 104 L. T. 354 ; 55 Sol. J. 363 ; 48 Sc. L. R. 399 61
Glasier *v.* Rolls (1889), 62 L. T. 133 [C. A.] 164
Glyn, Mills & Co. *v.* East and West India Docks Co. (1882), 7 App. Cas. 591 ; 52 L. J. Q. B. 146 ; 47 L. T. 309 ; 31 W. R. 201 ... 282
Godefroy *v.* Dalton (1830), 8 L. J. (O.S.) C. P. 79 ; 6 Bing. 460 ; 4 M. & P. 149 ; 31 R. R. 467 169
Goff *v.* Great Northern Rail. Co. (1861), 3 El. & El. 672 ; 30 L. J. Q. B. 148 ; 3 L. T. 850 ; 7 Jur. (N.S.) 286 60
Goffin *v.* Donnelly (1881), 6 Q. B. D. 307 ; 45 J. P. 439 ; 50 L. J. Q. B. 303 ; 44 L. T. 141 ; 29 W. R. 440 121
Goodtitle *v.* Alker (1757), 1 Burr. 133 ; 1 Ld. Ken. 427 271
Goodwyn *v.* Cheveley (1859), 28 L. J. Ex. 298 ; 4 H. & N. 631 ; 7 W. R. 631 198
Grainger *v.* Hill (1838), 7 L. J. C. P. 85 ; 4 Bing. N. C. 212 ; 5 Scott, 561 253
Grand Trunk Railway of Canada *v.* Barnett, [1911] A. C. 361 ; 104 L. T. 362 ; 27 T. L. R. 359 ... ... 170, 171
Grand Trunk Rail. Co. *v.* Jennings (1888), 13 App. Cas. 800 ; 58 L. J. P. C. 1 ; 59 L. T. 679 ; 37 W. R. 403 74
Great Western Rail. Co. *v.* Bennett (1867), L. R. 2 H. L. 27 ; 36 L. J. Q. B. 133 ; 16 L. T. 186 ; 15 W. R. 647 240
Green *v.* Duckett (1883), 11 Q. B. D. 275 ; 47 J. P. 487 ; 52 L. J. Q. B. 435 ; 48 L. T. 677 ; 31 W. R. 607 273
Greenslade *v.* Halliday (1830), 8 L. J. (O.S.) C. P. 124 ; 6 Bing. 379 ; 4 Moo. & P. 71 ; 53 R. R. 241 234

PAGE

Gregory *v.* Piper (1829), 9 B. & C. 591 ; 4 Man. & R. 500 ; 33 R. R. 268 267
——— *v.* Williams (1844), 1 C. & K. 568 82
Greta Holme, The, [1897] A. C. 596 ; 66 L. J. Adm. 166 ; 77 L. T. 23 ; 8 Asp. M. C. 317 80
Greville *v.* Chapman (1844), 5 Q. B. 744 ; 13 L. J. Q. B. 172 ; D. & M. 553 ; 8 Jur. 189 107
Griffin *v.* Coleman (1859), 28 L. J. Ex. 134 ; 4 H. & N. 265... 261, 262
Griffiths *v.* Dudley (Earl) (1882), 9 Q. B. D. 357 ; 51 L. J. Q. B. 543 ; 47 L. T. 10 ; 30 W. R. 797 ... ... 73, 211
——— *v.* Teetgen (1854), 15 C. B. 344 ; 24 L. J. C. P. 35 ; 3 W. R. 11 ; 1 Jur. (N.S.) 426 149
Grinham *v.* Willey (1859), 28 L. J. Ex. 242 ; 4 H. & N. 496 ; 7 W. R. 463 ; 5 Jur. (N.S.) 444 258
Groves *v.* Wimborne (Lord), [1898] 2 Q. B. 402 ; 67 L. J. Q. B. 862 ; 79 L. T. 284 ; 47 W. R. 87 ; 14 T. L. R. 493 [C. A.] ... 32, 205, 208
Gwilliam *v.* Twist, [1895] 2 Q. B. 84 ; 59 J. P. 484 ; 64 L. J. Q. B. 474 ; 72 L. T. 579 ; 43 W. R. 566 ; 14 R. 461 [C. A.] 62
Gwinnell *v.* Eamer (1875), L. R. 10 C. P. 658 ; 32 L. T. 835... 221, 224

H.

Haddrick *v.* Heslop (1848), 12 Q. B. 267 ; 17 L. J. Q. B. 313 ; 12 Jur. 600 137
Hadwell *v.* Righton, [1907] 2 K. B. 345 ; 71 J. P. 499 ; 76 L. J. K. B. 891 ; 97 L. T. 133 ; 23 T. L. R. 548 ; 5 L. G. R. 881 ... 17, 198
Halestrap *v.* Gregory, [1895] 1 Q. B. 561 ; 64 L. J. Q. B. 415 ; 72 L. T. 292 ; 43 W. R. 507 ; 15 R. 306 185
Haggard Frères *v.* Pelicier, [1892] A. C. 61 ; 61 L. J. P. C. 19 ; 65 L. T. 769 23
Halliday *v.* Holgate (1868), L. R. 3 Ex. 299 ; 37 L. J. Ex. 174 ; 18 L. T. 656 ; 17 W. R. 13 288
Halsey *v.* Brotherhood (1881), 19 Ch. D. 386 ; 51 L. J. Ch. 233 ; 45 L. T. 640 ; 30 W. R. 279 [C. A.] 130, 131
Hamilton *v.* Long, [1903] 2 I. R. 407 ; affirmed [1905] 2 I. R. 552 [C. A.]... 148
Hammersmith, etc. Rail. Co. *v.* Brand (1869), L. R. 4 H. L. 171 ; 38 L. J. Q. B. 265 ; 21 L. T. 238 ; 18 W. R. 12... ... ...25, 26
Hanbury *v.* Hanbury (1892), 8 T. L. R. 560 [C. A.]... 47
Hancock *v.* Somes (1859), 1 E. & E. 795 ; 28 L. J. M. C. 196 ; 7 W. R. 422 ; 5 Jur. (N.S.) 983 ; 8 Cox C. C. 172 265
Hannam *v.* Mockett (1824), 2 L. J. (O.S.) K. B. 183 ; 2 B. & C. 939 ; 4 D. & R. 518 ; 26 R. R. 591 273
Hardy *v.* Ryle (1829), 7 L. J. (O.S.) M. C. 118 ; 9 B. & C. 603 ; 4 M. & R. 295 97
Hargreave *v.* Spink, [1892] 1 Q. B. 25 ; 61 L. J. Q. B. 318 ; 65 L. T. 650 ; 40 W. R. 254 283
Hargroves Aronson & Co. *v.* Hartopp, [1905] 1 K. B. 472 ; 74 L. J. K. B. 233 ; 53 W. R. 262 ; 21 T. L. R. 226 ... ... 173, 224
Harrington (Earl) *v.* Derby Corporation, [1905] 1 Ch. 205 ; 69 J. P. 62 ; 74 L. J. Ch. 219 ; 92 L. T. 153 ... ...89, 98
Harris *v.* Brisco (1886), 17 Q. B. D. 504 ; 55 L. J. Q. B. 423 ; 55 L. T. 14 ; 34 W. R. 729 [C. A.] 144
——— *v.* Butler (1837), 6 L. J. Ex. 133 ; 2 M. & W. 542 ; M. & H. 117 ; 1 Jur. 608 ; 46 R. R. 695 146
——— *v.* Mobbs (1878), 3 Ex. D. 268 ; 39 L. T. 164 ; 27 W. R. 154 17

PAGE

Harris *v.* Perry & Co., [1903] 2 K. B. 219 ; 72 L. J. K. B. 725 ; 89 L. T. 174 [C. A.]... ... ... 41, 170, 171

Harrison *v.* Rutland (Duke), [1893] 1 Q. B. 142 ; 57 J. P. 278 ; 62 L. J. Q. B. 117 ; 68 L. T. 35 ; 41 W. R. 322 ; 4 R. 155 [C. A.] 268

——— *v.* Southwark and Vauxhall Water Co., [1891] 2 Ch. 409 ; 60 L. J. Ch. 630 ; 64 L. T. 864 89

Harrold *v.* Watney, [1898] 2 Q. B. 320 ; 67 L. J. Q. B. 771 ; 78 L. T. 788 ; 46 W. R. 642 [C. A.] 183, 219

Hart *v.* Wall (1877), 2 C. P. D. 146 ; 46 L. J. C. P. 227 ; 25 W. R. 373 114

Hartley *v.* Hindmarsh (1866), L. R. 1 C. P. 553 ; 35 L. J. M. C. 255 ; 14 L. T. 795 ; 14 W. R. 862 ; 1 H. & R. 607 ; 12 Jur. (N.S.) 502 264

Harvey *v.* Maine (1872), 6 I. C. L. R. 417 ... ... 253, 256

Hatchard *v.* Mege (1887), 18 Q. B. D. 771 ; 51 J. P. 277 ; 56 L. J. Q. B. 397 ; 56 L. T. 662 ; 35 W. R. 576 70

Haycroft *v.* Creasy (1801), 2 East, 92 ; 6 R. R. 380 47

Head *v.* Briscoe (1833), 5 C. & P. 484 ; 38 R. R. 841 52

Heaven *v.* Pender (1883), 11 Q. B. D. 503 ; 47 J. P. 709 ; 52 L. J. Q. B. 702 ; 49 L. T. 357 [C. A.] 169, 178

Hebditch *v.* MacIlwaine, [1894] 2 Q. B. 54 ; 58 J. P. 620 ; 63 L. J. Q. B. 587 ; 70 L. T. 826 ; 42 W. R. 422 ; 9 R. 452 127

Hedges *v.* Tagg (1872), L. R. 7 Ex. 283 ; 41 L. J. Ex. 169 ; 20 W. R. 976 ... ... 146, 147

Hedley *v.* Pinkney & Sons Steamship Co., [1892] 1 Q. B. 58 ; 56 J. P. 308 ; 61 L. J. Q. B. 179 ; 66 L. T. 71 ; 40 W. R. 113 ; 7 Asp. M. C. 135 [C. A.] 206

Hellwig *v.* Mitchell, [1910] 1 K. B. 609 ; 79 L. J. K. B. 270 ; 102 L. T. 110 ; 26 T. L. R. 244 ... ... 108, 111

Heming *v.* Power (1842), 10 M. & W. 564 ; 6 Jur. 858 ; 62 R. R. 705 110

Henderson *v.* Preston (1888), 21 Q. B. D. 362 ; 52 J. P. 820 ; 57 L. J. Q. B. 607 ; 36 W. R. 834 [C.A.] 24

Henderson & Co. *v.* Williams, [1895] 1 Q. B. 521 ; 64 L. J. Q. B. 308 ; 72 L. T. 98 ; 43 W. R. 274 [C.A.] 79

Hermann Loog *v.* Bean (1884), 26 Ch. D. 306 ; 48 J. P. 708 ; 53 L. J. Ch. 1128 ; 51 L. T. 442 ; 32 W. R. 994 [C. A.] ... 90

Hetherington *v.* North Eastern Rail. Co. (1882), 9 Q. B. D. 160 ; 51 L. J. Q. B. 495 ; 30 W. R. 797... 74

Hewlett *v.* Cruchley (1813), 5 Taunt. 283 136

Hickman *v.* Maisey, [1900] 1 Q. B. 752 ; 69 L. J. Q. B. 511 ; 82 L. T. 321 ; 48 W. R. 385 [C. A.] 268

Hicks *v.* Faulkner (1882), 8 Q. B. D. 167 ; 51 L. J. Q. B. 268 ; 30 W. R. 545... ... ... 136, 138

Higgins *v.* Searle (1909), 73 J. P. 185 ; 100 L. T. 280 ; 25 T. L. R. 301 ; 7 L. G. R. 640 [C. A.] 198

Hinton *v.* Heather (1845), 15 L. J. Ex. 39 ; 14 M. & W. 131 ... 137

Hodgson *v.* Sidney (1866), L. R. 1 Ex. 313 ; 35 L. J. Ex. 182 ; 14 L. T. 624 ; 14 W. R. 923 ; 4 H. & C. 492 ; 12 Jur. (N.S.) 694 ... ...70, 71

Hodson *v.* Pare, [1899] 1 Q. B. 455 ; 68 L. J. Q. B. 309 ; 80 L. T. 13 ; 47 W. R. 241 [C. A.] 122

Hogg *v.* Ward (1858), 27 L. J. Ex. 443 ; 6 W. R. 595 ; 3 H. & N. 417 ; 4 Jur. (N.S.) 885 261

Holden *v.* Thompson, [1907] 2 K. B. 489 ; 78 L. J. K. B. 889 ; 97 L. T. 138 ; 23 T. L. R. 529 144

PAGE

Hole *v.* Barlow (1858), 4 C. B. (N.S.) 334 ; 27 L. J. C. P. 207 ; 6 W. R. 619 ; 4 Jur. (N.S.) 1019 230

—— *v.* Sittingbourne and Sheerness Rail. Co. (1861), 30 L. J. Ex. 81 ; 3 L. T. 750 ; 9 W. R. 274 ; 6 H. & N. 488 ... ...63, 66

Holleran *v.* Bagnell (1879), 4 L. R. Ir. 740 72

Holliday *v.* National Telephone Co., [1899] 2 Q. B. 392 ; 68 L. J. Q. B. 1016 ; 81 L. T. 252 ; 47 W. R. 658 ; 15 T. L. R. 483 [C. A.]... 67

Hollins *v.* Fowler (1875), L. R. 7 H. L. 757 ; 44 L. J. Q. B. 169 ; 33 L. T. 73 ... ... 281, 282

Holmes *v.* Mather (1875), L. R. 10 Ex. 261 ; 44 L. J. Ex. 176 ; 33 L. T. 361 ; 23 W. R. 364 252

Holt *v.* Scholefield (1796), 6 T. R. 691 ; 3 R. R. 318 111

Hope *v.* Evered (1886), 17 Q. B. D. 338 ; 55 L. J. M. C. 146 ; 55 L. T. 320 ; 34 W. R. 742 ; 16 Cox C. C. 112... 135

Horwood *v.* Smith (1788), 2 T. R. 750 ; 2 Leach C. C. 586 n. ; 1 R. R. 613 283

Houlden *v.* Smith (1850), 14 Q. B. 841 ; 19 L. J. Q. B. 170 ; 14 Jur. 598 ... ...21, 23

Hounsell *v.* Smyth (1860), 7 C. B. (N.S.) 731 ; 29 L. J. C. P. 203 ; 1 L. T. 440 ; 8 W. R. 277 ; 6 Jur. (N.S.) 897 ... ... 175, 219

Hubbuck & Sons *v.* Wilkinson, Heywood and Clark, [1899] 1 Q. B. 86 ; 68 L. J. Q. B. 34 ; 79 L. T. 429 [C. A.] 130, 131

Hudson *v.* Roberts (1851), 6 Ex. 679 ; 20 L. J. Ex. 299 ... 196, 197

Huffer *v.* Allen (1866), L. R. 2 Ex. 15 ; 36 L. J. Ex. 17 ; 15 L. T. 225 ; 15 W. R. 281 ; 4 H. & C. 634 ; 12 Jur. (N.S.) 930 ... 139

Huggett *v.* Miers, [1908] 2 K. B. 278 ; 77 L. J. K. B. 710 ; 99 L. T. 326 ; 24 T. L. R. 582 ; 52 Sol. J. 481 [C. A.] 173

Hughes *v.* Percival (1883), 8 App. Cas. 443 ; 47 J. P. 772 ; 52 L. J. Q. B. 719 ; 49 L. T. 189 ; 31 W. R. 725 ... ...64, 66

Hulton (E.) & Co. *v.* Jones, [1910] A. C. 20 ; 79 L. J. K. B. 198 ; 101 L. T. 831 ; 26 T. L. R. 128 ; 54 Sol. J. 116 ; 47 Sc. L. R. 591 ... ... 13, 105, 113

Hume *v.* Oldacre (1816), 1 Stark. 351 ; 18 R. R. 779 49

Humphries *v.* Brogden (1850), 12 Q. B. 739 ; 20 L. J. Q. B. 10 ; 15 Jur. 124 239

Hunt *v.* Great Northern Rail. Co., [1891] 2 Q. B. 189 ; 55 J. P. 648 ; 60 L. J. Q. B. 498 [C. A.] 126

—— *v.* Star Newspaper Co., Limited, [1908] 2 K. B. 309 ; 77 L. J. K. B. 732 ; 98 L. T. 629 ; 24 T. L. R. 452 ; 52 Sol. J. 376 [C. A.] 120

Hutchinson *v.* York, Newcastle, and Berwick Rail. Co. (1850), 19 L. J. Ex. 296 ; 5 Ex. 343 ; 6 Rail. Cas. 580 205

I.

Ilott *v.* Wilkes (1820), 3 B. & A. 304 ; 22 R. R. 400 27

Imperial Gas Light and Coke Co. (Directors) *v.* Broadbent (1859), 29 L. J. Ch. 377 ; 7 H. L. Cas. 600 ; 5 Jur. (N.S.) 1319 ... 87

Inchbald *v.* Robinson, Inchbald *v.* Barrington (1869), L. R. 4 Ch. 388 ; 20 L. T. 259 ; 17 W. R. 459... 227

Indermaur *v.* Dames (1866), L. R. 1 C. P. 274 ; affirmed (1867), L. R. 2 C. P. 311 ; 36 L. J. C. P. 181 ; 16 L. T. 293 ; 15 W. R. 434 ... ... 13, 171, 174

PAGE

Irwin *v.* Brandwood (1864), 33 L. J. Ex. 257 ; 9 L. T. 772 ; 12 W. R. 438 ; 2 H. & C. 960 ; 10 Jur. (N.S.) 370 111
Ismay, Imrie & Co. *v.* Williamson, [1908] A. C. 437 ; 77 L. J. P. C. 107 ; 99 L. T. 595 ; 24 T. L. R. 881 ; 52 Sol. J. 713 213
Ivay *v.* Hedges (1882), 9 Q. B. D. 80 173

J.

Jackson *v.* Smithson (1846), 15 M. & W. 563 ... ... 196, 197
——— *v.* Watson & Sons, [1909] 2 K. B. 193 ; 78 L. J. K. B. 587 ; 100 L. T. 799 ; 25 T. L. R. 454 ; 53 Sol. J. 447 [C. A.] ... 73
Jacobs *v.* Seward (1872), L. R. 5 H. L. 464 ; 41 L. J. C. P. 221 ; 27 L. T. 185 ... ... 272, 290
J'Anson *v.* Stuart (1787), 1 T. R. 748 ; 1 R. R. 392 104
Jenkins *v.* Jackson (1888), 40 Ch. D. 71 ; 58 L. J. Ch. 124 ; 60 L. T. 105 ; 37 W. R. 253 227
Jenner *v.* A'Beckett (1871), L. R. 7 Q. B. 11 ; 41 L. J. Q. B. 14 ; 25 L. T. 464 ; 20 W. R. 181 112
Jennings *v.* Rundall (1799), 8 T. R. 335 ; 4 R. R. 680 47
Jenoure *v.* Delmege, [1891] A. C. 73 ; 55 J. P. 500 ; 60 L. J. P. C. 11 ; 63 L. T. 814 ; 39 W. R. 388 123
Jewson *v.* Gatti (1886), 2 T. L. R. 441 [C. A.] 183
Job *v.* Potton (1875), L. R. 20 Eq. 84 ; 44 L. J. Ch. 262 ; 32 L. T. 110 272
Johnson *v.* Emerson (1871), L. R. 6 Ex. 329 ; 40 L. J. Ex. 201 ; 25 L. T. 337 ... ... 133, 140
——— *v.* Lindsay & Co., [1891] A. C. 371 ; 55 J. P. 644 ; 61 L. J. Q. B. 90 ; 65 L. T. 97 ; 40 W. R. 405... 207
——— *v.* Marshall, Sons & Co., Limited, [1906] A. C. 409 ; 75 L. J. K. B. 868 ; 94 L. T. 828 ; 22 T. L. R. 565 [C. A.] ... 215
——— *v.* Pie (1665), 1 Keb. 905, 913 47
Johnston *v.* Great Western Rail. Co., [1904] 2 K. B. 250 ; 73 L. J. K. B. 568 ; 91 L. T. 157 ; 50 W. R. 612 ; 20 T. L. R. 455 [C. A.] 77, 78, 81, 82
Jones *v.* Boyce (1816), 1 Stark. 493 ; 18 R. R. 812 189
—— *v.* Chapman (1849), 2 Ex. 803, 821 270
—— *v.* Festiniog Rail. Co. (1868), L. R. 3 Q. B. 733 ; 9 B. & S. 835 ; 37 L. J. Q. B. 214 ; 18 L. T. 902 ; 17 W. R. 28 ; 27, 201
—— *v.* Gooday (1841), 10 L. J. Ex. 275 ; 8 M. & W. 146 ; 1 D. (N.S.) 50 ; 58 R. R. 649 79
—— *v.* Herne (1759), 2 Wils. 87 110
—— *v.* Scullard, [1898] 2 Q. B. 565 ; 67 L. J. Q. B. 895 ; 79 L. T. 386 57
—— *v.* Williams (1843), 11 M. & W. 176 ; 12 L. J. Ex. 249 ; 63 R. R. 564 236
Jordeson *v.* Sutton, Southcoates and Drypool Gas Co., [1899] 2 Ch. 217 ; 63 J. P. 692 ; 68 L. J. Ch. 457 ; 80 L. T. 815 ... 239, 240
Joynt *v.* Cycle Trade Publishing Co., [1904] 2 K. B. 292 ; 73 L. J. K. B. 752 ; 91 L. T. 155 [C. A.] 120
Judge *v.* Cox (1816), 1 Stark. 285 197

K.

Kansas Pacific Rail. Co. *v.* Mihlman (1876), 17 Kansas Reports 224 : 97
Keates *v.* Cadogan (Earl) (1851), 10 C. B. 591 ; 20 L. J. C. P. 76 ; 15 Jur. 428 242

PAGE

Keen *v.* Henry, [1894] 1 Q. B. 292 ; 58 J. P. 262 ; 63 L. J. Q. B. 211 ; 69 L. T. 671 ; 42 W. R. 214 ; 9 R. 102 58
Keighley, Maxsted & Co. *v.* Durant, [1901] A. C. 240 ; 70 L. J. K. B. 662 ; 84 L. T. 777 55
Kelly *v.* Metropolitan Rail. Co., [1895] 1 Q. B. 944 ; 59 J. P. 437 ; 64 L. J. Q. B. 568 ; 72 L. T. 551 ; 43 W. R. 497 ; 14 R. 417 [C. A.] 37, 38, 170
Kendillon *v.* Maltby (1842), Car. & M. 402 ; 2 M. & Rob. 438 ... 115
Kensit *v.* Great Eastern Rail. Co. (1884), 27 Ch. D. 122 ; 54 L. J. Ch. 19 ; 51 L. T. 862 ; 32 W. R. 885 [C. A.] 247
Keyse *v.* Powell (1853), 2 El. & Bl. 132 ; 22 L. J. Q. B. 305 ; 17 Jur. 1052 271
Kidgill *v.* Moor (1850), 9 C. B. 364 ; 19 L. J. C. P. 177 ; 1 L. M. & P. 131 ... ... 234, 235, 248
Kimber *v.* Press Association, [1893] 1 Q. B. 65 ; 57 J. P. 247 ; 62 L. J. Q. B. 152 ; 67 L. T. 515 ; 41 W. R. 17 ; 4 R. 95 [C. A.] 127
Kine *v.* Jolly, [1905] 1 Ch. 480 ; 74 L. J. Ch. 174 ; 53 W. R. 462 [C. A.] 245
King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281 ; 53 J. P. 788 ; 58 L. J. Q. B. 456 ; 61 L. T. 34 ; 37 W. R. 737 [C. A.] 57
—— *v.* Rose (1673), 1 Freem. 347 284
Kirk *v.* Gregory (1876), 1 Ex. D. 55 ; 45 L. J. Ex. 186 ; 34 L. T. 488 ; 24 W. R. 614 ... ... 281, 285
—— *v.* Todd (1882), 21 Ch. D. 484 ; 52 L. J. Ch. 224 ; 47 L. T. 676 ; 31 W. R. 69 [C. A.] 69

L.

Lafond *v.* Ruddock (1853), 13 C. B. 813 ; 22 L. J. C. P. 217 ; 1 W. R. 371 ; 1 C. L. R. 339 ; 17 Jur. 624 97
Lambert *v.* Lowestoft Corporation [1901] 1 K. B. 590 ; 65 J. P. 326 ; 70 L. J. K. B. 333 ; 84 L. T. 237 ; 49 W. R. 316 ; 17 T. L. R. 273 34
Lamine *v.* Dorrell (1705), 2 Ld. Raym. 1216 289
Lancashire Waggon Co. *v.* Fitzhugh (1861), 30 L. J. Ex. 231 ; 3 L. T. 703 ; 6 H. & N. 502 ... ... 282, 284
Lane *v.* Capsey, [1891] 3 Ch. 411 ; 61 L. J. Ch. 55 ; 65 L. T. 375 ; 40 W. R. 87 236
—— *v.* Cox, [1897] 1 Q. B. 415 ; 66 L. J. Q. B. 193 ; 76 L. T. 135 ; 45 W. R. 261 [C. A.] 172, 224
Langridge *v.* Levy (1837), 6 L. J. Ex. 137 ; 2 M. & W. 519 ; 46 R. R. 689 ... ... 162, 165
Latter *v.* Braddell and Sutcliffe (1881), 29 W. R. 239 252
Law *v.* Llewellyn, [1906] 1 K. B. 487 ; 70 J. P. 220 ; 75 L. J. K. B. 320 ; 94 L. T. 359 ; 54 W. R. 368 122
Lawrence *v.* Obee (1815), 1 Stark. 22 267
Lay *v.* Midland Rail. Co. (1875), 34 L. T. 30 183
Lax *v.* Darlington Corporation (1879), 5 Ex. D. 28 ; 49 L. J. Ex. 105 ; 41 L. T. 489 ; 28 W. R. 221 [C. A.] 28
Lee *v.* Riley (1865), 18 C. B. (N.S.) 722 ; 34 L. J. C. P. 212 ; 12 L. T. 388 ; 13 W. R. 751 ; 11 Jur. (N.S.) 527 199
Leith *v.* Pope (1779). 2 W. Bla. 1327 137
Le Lievre *v.* Gould, [1893] 1 Q. B. 491 ; 57 J. P. 484 ; 62 L. J. Q. B. 353 ; 68 L. T. 626 ; 41 W. R. 468 ; 4 R. 274 [C. A.] : 39, 162, 168, 169

PAGE
Lemaitre *v.* Davis (1881), 19 Ch. D. 281 ; 46 J. P. 324 ; 51 L. J. Ch. 173 ; 46 L. T. 407 ; 30 W. R. 360 242
Lemmon *v.* Webb, [1895] A. C. 1 ; 59 J. P. 564 ; 64 L. J. Ch. 205 ; 71 L. T. 647 ; 11 R. 116 ... ... 227, 235, 236
Lethbridge *v.* Kirkman (1855), 25 L. J. Q. B. 89 ; 4 W. R. 90 ; 2 Jur. (N.S.) 378 96
Ley *v.* Peter (1858), 27 L. J. Ex. 239 ; 6 W. R. 437 ; 3 H. & N. 101 276
Limpus *v.* London General Omnibus Co. (1863), 32 L. J. Ex. 34 ; 7 L. T. 641 ; 11 W. R. 149 ; 1 H. & C. 526 ; 9 Jur. (N.S.) 333 : 59
Lister *v.* Perryman (1870), L. R. 4 H. L. 521 ; 39 L. J. Ex. 177 ; 23 L. T. 269 ; 19 W. R. 9 ... ... 135, 137
Littledale *v.* Liverpool College, [1900] 1 Ch. 19 ; 69 L. J. Ch. 87 ; 81 L. T. 564 ; 48 W. R. 177 [C. A.] 277
London and Brighton Rail. Co. *v.* Truman (1885), 11 App. Cas. 45 ; 50 J. P. 388 ; 55 L. J. Ch. 354 ; 54 L. T. 250 ; 34 W. R. 657 ... 26
Longmeid *v.* Holliday (1851), 20 L. J. Ex. 430 ; 6 Ex. 761 ... 180
Lotan *v.* Cross (1810), 2 Camp. 464 ... ... 280, 285
Lowery *v.* Walker, [1910] 1 K. B. 173 ; reversed, [1911] A. C. 10 ; 80 L. J. K. B. 138 ; 103 L. T. 674 ; 27 T. L. R. 83 ; 55 Sol. J. 62 ; 48 Sc. L. R. 726 ... ... 175, 199
Low Moor Co. *v.* Stanley Coal Co. (1876), 34 L. T. 186 [C. A.] ... 277
Low (*or* Jackson) *v.* General Steam Fishing Co., Limited, [1909] A. C. 523 ; 78 L. J. P. C. 148 ; 101 L. T. 401 ; 25 T. L. R. 787 ; 53 Sol. J. 763 214
Ludgater *v.* Love (1881), 45 J. P. 600 ; 44 L. T. 694 [C. A.] ... 165
Lumley *v.* Gye (1853), 2 E. & B. 216 ; 22 L. J. Q. B. 463 ; 1 W. R. 432 ; 17 Jur. 827 ... ... 153, 154
Lygo *v.* Newbold (1854), 9 Ex. 302 ; 23 L. J. Ex. 108 ; 2 W. R. 158 ; 2 C. L. R. 449 ... ... 27, 170
Lyles *v.* Southend-on-Sea Corporation, [1905] 2 K. B. 1 ; 69 J. P. 193 ; 74 L. J. K. B. 484 ; 92 L. T. 586 ; 21 T. L. R. 389 ; 3 L. G. R. 691 [C. A.] 99
Lynch *v.* Knight (1861), 9 H. L. Cas. 577 ; 5 L. T. 291 ; 8 Jur. (N.S.) 724 ... ... 108, 109
——— *v.* Nurdin (1841), 1 Q. B. 29 ; 10 L. J. Q. B. 73 ; 4 P. & D. 672 ; 5 Jur. 797 ; 55 R. R. 191 ... ... 18, 180, 181
Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662 ; 46 L. J. Ch. 68 ; 35 L. T. 569 ; 25 W. R. 165 ... ... 10, 221

M.

Machado *v.* Fontes, [1897] 2 Q. B. 231 ; 66 L. J. Q. B. 542 ; 76 L. T. 588 ; 45 W. R. 565 [C. A.] 43, 44
Macintosh *v.* Dun, [1908] A. C. 390 ; 77 L. J. P. C. 113 ; 99 L. T. 64 ; 24 T. L. R. 705 ; 52 Sol. J. 580 123
Mackay *v.* Ford (1860), 29 L. J. Ex. 404 ; 2 L. T. 514 ; 8 W. R. 506 ; 5 H. & N. 792 ; 6 Jur. (N.S.) 587 122
McCartney *v.* Londonderry and Lough Swilly Railway, [1904] A. C. 301 ; 73 L. J. P. C. 73 ; 91 L. T. 105 246
McDowall *v.* Great Western Railway, [1903] 2 K. B. 331 ; 72 L. J. K. B. 752 ; 88 L. T. 825 [C. A.] 18, 184
M'Gregor *v.* Thwaites (1824), 2 L. J. K. B. 217 ; 3 B. & C. 35 ; 4 Dow. & Ry. 695 ; 27 R. R. 274 116
McKenzie *v.* Hardinge (1906), 23 T. L. R. 15 145
McKinnon *v.* Penson, 8 Ex. 319 33
M'Pherson *v.* Daniels (1830), 8 L. J. (O.S.) K. B. 14 ; 10 B. & C. 263 ; 5 M. & Ry. 251 ; 34 R. R. 397 ... ... 115, 118

PAGE
McQuire *v.* Western Morning News Co., [1903] 2 K. B. 100 ; 72 L. J. K. B. 612 ; 88 L. T. 757 ; 51 W. R. 689 [C. A.] 119
Madras Rail. Co. *v.* Zemindar of Carvatenagaram (1874), L. R. 1 Ind. App. 364 195
Magdalena Steam Navigation Co. *v.* Martin (1859), 2 El. & El. 94 ; 28 L. J. Q. B. 310 ; 7 W. R. 598 ; 5 Jur. (N.S.) 1260 46
Manby *v.* Scott (1663), 1 Sid. 109 47
Manchester Corporation *v.* Williams, [1891] 1 Q. B. 94 ; 54 J. P. 712 ; 60 L. J. Q. B. 23 ; 63 L. T. 805 ; 39 W. R. 302 ... 45, 105, 107
Mangena *v.* Wright, [1909] 2 K. B. 958 ; 78 L. J. K. B. 879 ; 100 L. T. 960 ; 25 T. L. R. 534 ; 53 Sol. J. 485... 127
Manley *v.* Field (1859), 7 C. B. (N.S.) 96 ; 29 L. J. C. P. 79 ; 6 Jur. (N.S.) 300 148
Mann *v.* Ward (1892), 8 T. L. R. 699 19
Manzoni *v.* Douglas (1880), 6 Q. B. D. 145 ; 45 J. P. 291 ; 50 L. J. Q. B. 289 ; 29 W. R. 425 ... ... 14, 185
Markey *v.* Tolworth Joint Isolation Hospital District Board, [1900] 2 Q. B. 454 ; 64 J. P. 648 ; 69 L. J. Q. B. 738 ; 83 L. T. 28 ; 16 T. L. R. 411 99
Marks *v.* Frogley, [1898] 1 Q. B. 888 ; 67 L. J. Q. B. 605 ; 78 L. T. 607 ; 46 W. R. 548 [C. A.] 256
——— *v.* Samuel, [1904] 2 K. B. 287 ; 73 L. J. K. B. 587 ; 90 L. T. 590 ; 53 W. R. 88 ; 20 T. L. R. 430 111
Marsh *v.* Joseph, [1897] 1 Ch. 213 ; 66 L. J. Ch. 128 ; 75 L. T. 558 ; 45 W. R. 209 [C. A.] 55
——— *v.* Loader (1863), 14 C. B. (N.S.) 535 ; 11 W. R. 784 ... 261
Marshall *v.* York, Newcastle and Berwick Rail. Co. (1851), 11 C. B. 655 ; 21 L. J. C. P. 34 ; 16 Jur. 124 [C. A.] 39
Martin, *Ex parte* (1879), 4 Q. B. D. 212 ; affirmed *sub nom.* Martin *v.* Bannister (1879), 4 Q. B. D. 491 ; 48 L. J. Q. B. 677 ; 28 W. R. 143 [C. A.] 87
——— *d.* Tregonwell *v.* Strachan (1743), 5 T. R. 107 n ; 6 Bro. P. C. 319 ; 1 Wils. 266 ; 2 Stra. 1179 ; 2 R. R. 552 n... 274
Martindale *v.* Smith (1841), 1 Q. B. 389 ; 10 L. J. Q. B. 155 ; 1 G. & D. 1 ; 5 Jur. 932 ; 55 R. R. 285 288
Mason *v.* Cæsar (1676), 2 Mod. 66 236
——— *v.* Hill (1832), 1 L. J. K. B. 107 ; 3 B. & Ad. 304 ; 39 R. R. 354 248
Masper and Wife *v.* Brown (1875), 1 C. P. D. 97 ; 45 L. J. C. P. 203 ; 34 L. T. 254 ; 24 W. R. 469 265
Mathews *v.* London Street Tramways Co. (1886), 52 J. P. 774 ; 58 L. J. Q. B. 12 ; 60 L. T. 47 183
May *v.* Burdett (1846), 9 Q. B. 101 ; 16 L. J. Q. B. 64 ; 10 Jur. 692 ; 72 R. R. 189 ... ... 196, 197
Mayhew *v.* Herrick (1849), 7 C. B. 229 ; 18 L. J. C. P. 179 ; 13 Jur. 1078 290
Mears *v.* London and South Western Rail. Co. (1862), 11 C. B. (N.S.) 854 ; 31 L. J. C. P. 220 ; 6 L. T. 190 284
Mediana, The, [1900] A. C. 113 ; 69 L. J. P. 35 ; 82 L. T. 95 ; 48 W. R. 398 ; 9 Asp. M. C. 41 80
Mee *v.* Cruikshank (1902), 66 J. P. 89 ; 86 L. T. 706 253
Merest *v.* Harvey (1814), 5 Taunt. 442 ; 1 Marsh. 139 ; 15 R. R. 548 : 85
Merivale *v.* Carson (1887), 20 Q. B. D. 275 ; 52 J. P. 261 ; 58 L. T. 331 ; 36 W. R. 231 [C. A.]... ... ... 119, 120
Merryweather *v.* Nixon, 8 T. R. 186 ; 16 R. R. 810 49
Mersey Docks (Trustees) *v.* Gibbs (1866), L. R. 1 H. L. 93 ; 35 L. J. Ex. 225 ; 12 Jur. (N.S.) 571 ; 14 L. T. 697 ; 14 W. R. 872 ... 46
Metropolitan Association, etc. *v.* Petch (1858), 5 C. B. (N.S.) 504 ; 27 L. J. C. P. 330 ; 4 Jur. (N.S.) 1000 234

PAGE

Metropolitan Asylums District *v.* Hill (1881), 6 App. Cas. 193; 45 J. P. 664; 50 L. J. Q. B. 353; 44 L. T. 653; 29 W. R. 617 ... ...25, 26, 227

Metropolitan Bank *v.* Pooley (1885), 10 App. Cas. 210; 49 J. P. 756; 54 L. J. Q. B. 449; 53 L. T. 163; 33 W. R. 709... 139—141

Metropolitan Rail. Co. *v.* Jackson (1877), 3 App. Cas. 193; 47 L. J. C. P. 303; 37 L. T. 679; 26 W. R. 175 187

Metropolitan Saloon Omnibus Co. *v.* Hawkins (1859), 28 L. J. Ex. 201; 4 H. & N. 87; 7 W. R. 265; 5 Jur. (N.S.) 226 106

Meux *v.* Great Eastern Rail. Co., [1895] 2 Q. B. 387; 59 J. P. 662; 64 L. J. Q. B. 657; 73 L. T. 247; 43 W. R. 680; 14 R. 620 [C. A.]... ... ... 39, 177

Midland Insurance Co. *v.* Smith (1881), 6 Q. B. D. 561; 45 J. P. 699; 50 L. J. Q. B. 329; 45 L. T. 411; 29 W. R. 850 ... 30

Miller *v.* David (1874), L. R. 9 C. P. 118; 43 L. J. C. P. 84; 30 L. T. 58; 22 W. R. 332 112

——— *v.* Dell, [1891] 1 Q. B. 468; 60 L. J. Q. B. 404; 63 L. T. 693; 39 W. R. 342 [C. A.] 96, 287

——— *v.* Hancock, [1893] 2 Q. B. 177; 57 J. P. 758; 69 L. T. 214; 41 W. R. 578; 4 R. 478 [C. A.] 173, 224

Miner *v.* Gilmour (1858), 12 Moo. P. C. C. 131; 7 W. R. 328 ... 245

Mitchell *v.* Crassweller (1853), 13 C. B. 237; 22 L. J. C. P. 100; 1 W. R. 153; 17 Jur. 716 58

Mogul Steamship Co., Limited *v.* McGregor, Gow & Co., [1892] A. C. 25; 56 J. P. 101; 61 L. J. Q. B. 295; 66 L. T. 1; 40 W. R. 337; 7 Asp, M. C. 120 157

Monson *v.* Tussaud's, Limited, Monson *v.* Tussaud (Louis), [1894] 1 Q. B. 671; 58 J. P. 524; 63 L. J. Q. B. 454; 70 L. T. 335; 9 R. 177 [C. A.] 88, 108

Montgomery *v.* Thompson, [1891] A. C. 217; 55 J. P. 756; 60 L. J. Ch. 757; 64 L. T. 748 159

Moore *v.* Meagher (1807), 1 Taunt. 39; 3 Smith, 135; 9 R. R. 702 109

——— *v.* Robinson (1831), 1 L. J. K. B. 4; 2 B. & Ad. 817 ... 285

Mordaunt *v.* Mordaunt (1870), L. R. 2 P. & D. 102 47

Morgan *v.* Lingen (1863), 8 L. T. 800 106

——— *v.* London General Omnibus Co. (1884), 13 Q. B. D. 832; 48 J. P. 503; 53 L. J. Q. B. 352; 51 L. T. 213; 32 W. R. 759 [C. A.] 211

——— *v.* Vale of Neath Rail. Co. (1865), L. R. 1 Q. B. 149; 5 B. & S. 736; 35 L. J. Q. B. 23; 13 L. T. 564; 14 W. R. 144: 204, 206

Mortimer *v.* Cradock (1843), 12 L. J. C. P. 166; 7 Jur. 45; 61 R. R. 784 80

Mostyn *v.* Fabrigas (1774), 1 Sm. L. C. 628; 1 Cowp. 161 ... ...43, 48

Moulton *v.* Edmonds (1859), 29 L. J. Ch. 181; 8 W. R. 153; 6 Jur. (N.S.) 305; 1 De G. F. & J. 246 96

Mullett *v.* Mason (1866), L. R. 1 C. P. 559; 35 L. J. C. P. 299; 14 L. T. 558; 14 W. R. 898; 12 Jur. (N.S.) 547; 1 H. & R. 779 82

Mumford *v.* Oxford, Worcester and Wolverhampton Rail. Co. (1856), 25 L. J. Ex. 265 234

Munster *v.* Lamb (1883), 11 Q. B. D. 588; 47 J. P. 805; 52 L. J. Q. B. 726; 49 L. T. 252; 32 W. R. 248 [C. A.]... 122

Murray *v.* Fitzgerald, [1906] 2 I. R. 254 [C. A.] 147, 149

——— *v.* Hall (1849), 7 C. B. 441; 18 L. J. C. P. 161; 13 Jur. 262 272

Musgrave *v.* Pulido (1879), 5 App. Cas. 102; 49 L. J. P. C. 20; 41 L. T. 629; 28 W. R. 373 48

N.

PAGE
National Phonograph Co., Limited *v.* Edison Bell Consolidated Phonograph Co., Limited, [1908] 1 Ch. 335 ; 77 L. J. Ch. 218 ; 98 L. T. 291 ; 24 T. L. R. 201 [C. A.] 155
National Telephone Co. *v.* Baker, [1893] 2 Ch. 185 ; 57 J. P. 373 ; 62 L. J. Ch. 699 ; 68 L. T. 283 ; 3 R. 318 192
Nelson *v.* Liverpool Brewery Co. (1877), 2 C. P. D. 311 ; 46 L. J. C. P. 675 ; 25 W. R. 877 ... ... 221, 223
Netherlands South African Rail. Co. *v.* Fisher (1901), 18 T. L. R. 116 45
Nevill *v.* Fine Art and General Insurance Co., [1897] A. C. 68 ; 61 J. P. 500 ; 66 L. J. Q. B. 195 ; 75 L. T. 606 108
Nicolls *v.* Bastard (1835), 5 L. J. Ex. 7 ; 2 C. M. & R. 659 ; 1 Tyr. & G. 156 ; 1 Gale, 295 289
Nichols *v.* Marsland (1876), L. R. 10 Ex. 255 ; on appeal, 2 Ex. D. 1 ; 46 L. J. Ex. 174 ; 35 L. T. 725 ; 25 W. R. 173 [C. A.] : 193, 194
Nisbet *v.* Rayne and Burn, [1910] 2 K. B. 689 ; 80 L. J. K. B. 84 ; 103 L. T. 178 ; 26 T. L. R. 632 ; 54 Sol. J. 719 ; 3 B. W. C. C. 507 [C. A.] 214
Norris *v.* Baker (1616), 1 Roll. Rep. 393, fol. 15 236
Northampton Corporation *v.* Ward (1745), 1 Wils. 107 ; 2 Str. 1238 : 271
North-Eastern Rail. Co. *v.* Elliott (1860), 29 L. J. Ch. 808 241
Notley *v.* Buck (1828), 6 L. J. (O.S.) K. B. 271 ; 8 B. & C. 160 ; 2 M. & R. 68 289
Nugent *v.* Smith (1876), 1 C. P. D. 423 ; 45 L. J. C. P. 697 ; 34 L. T. 827 ; 24 W. R. 237 ; 3 Asp. M. C. 198 [C. A.] ... 193

O.

Oakey & Son *v.* Dalton (1887), 35 Ch. D. 700 ; 56 L. J. Ch. 823 ; 57 L. T. 18 ; 35 W. R. 709... 70
Ocean Accident and Guarantee Corporation *v.* Ilford Gas Co., [1905] 2 K. B. 493 ; 74 L. J. K. B. 799 ; 93 L. T. 381 ; 21 T. L. R. 610 [C. A.] 271
Oldham *v.* Peake (1774), 2 W. Bl. 959 110
Olliett *v.* Bessey (1682), 2 T. Jo. 214 24
Onslow *v.* Horne (1771), 2 W. Bl. 750 ; 3 Wils. 177... 109
Osborn *v.* Gillett (1873), L. R. 8 Ex. 88 ; 42 L. J. Ex. 53 ; 28 L. T. 197 ; 21 W. R. 409 29
Osborne *v.* Chocqueel, [1896] 2 Q. B. 109 ; 65 L. J. Q. B. 534 ; 74 L. T. 786 ; 44 W. R. 575 ... ... 196, 197
Oughton *v.* Seppings (1830), 8 L. J. (O.S.) K. B. 394 ; 1 B. & Ad. 241 ; 35 R. R. 284 289
Oxley *v.* Watts (1785), 1 T. R. 12 ; 1 R. R. 133 286

P.

Page *v.* Cowasjee Eduljee (1866), L. R. 1 P. C. 127 ; 14 L. T. 176 ; 12 Jur. (N.S.) 361 288
Panton *v.* Williams (1841), 2 Q. B. 169 ; 10 L. J. Ex. 545 ; 1 G. & D. 504 ; 57 R. R. 631 135
Paris *v.* Levy (1860), 9 C. B. (N.S.) 342 ; 30 L. J. C. P. 11 ; 3 L. T. 323 ; 9 W. R. 71 ; 7 Jur. (N.S.) 289 119
Parkins *v.* Scott (1862), 31 L. J. Ex. 331 ; 6 L. T. 394 ; 10 W. R. 562 ; 1 H. & C. 153 ; 8 Jur. (N.S.) 593 115

PAGE

Partridge *v.* Scott (1838), 7 L. J. Ex. 101 ; 3 M. & W. 220 ; 49 R. R. 578 241

Pasley *v.* Freeman (1789), 3 T. R. 51 ; 2 Sm. L. C. 68 ; 1 R. R. 634 : 162, 163

Patrick *v.* Colerick (1838), 7 L. J. Ex. 135 ; 3 M. & W. 483 ; 49 R. R. 696 268

Paul *v.* Summerhayes (1879), 4 Q. B. D. 9 ; 48 L. J. M. C. 33 ; 39 L. T. 574 ; 27 W. R. 215 ; 14 Cox C. C. 202 267

Payne *v.* Rogers (1794), 2 H. Bl. 350 ; 3 R. R. 415 222

Pease *v.* Chaytor (1863), 3 B. & S. 620 ; 32 L. J. M. C. 121 ; 8 L. T. 613 : 11 W. R. 563 ; 9 Jur. (N.S.) 664 23

Peek *v.* Gurney (1873), L. R. 6 H. L. 377 ; 43 L. J. Ch. 19 ; 22 W. R. 29 164

Peer *v.* Humphrey (1835), 4 L. J. K. B. 100 ; 2 A. & E. 495 ; 4 N. & M. 430 ; 1 H. & W. 28 ; 41 R. R. 471 282

Penn *v.* Ward (1835), 2 C. M. & R. 338 256

Penny *v.* Wimbledon District Council, [1899] 2 Q. B. 72 ; 63 J. P. 406 ; 68 L. J. Q. B. 704 ; 80 L. T. 615 ; 47 W. R. 565 [C. A.]... 67

Penruddock's Case (1598), 5 Co. Rep. 100 b 232

Petrel, The, [1893] P. 320 ; 62 L. J. P. 92 ; 70 L. T. 417 ; 1 R. 651 ; 7 Asp. M. C. 434 207

Phillips *v.* Barnet (1876), 1 Q. B. D. 436 ; 45 L. J. Q. B. 277 ; 34 L. T. 177 ; 24 W. R. 345 45

——— *v.* Eyre (1870), L. R. 4 Q. B. 225 ; 38 L. J. Q. B. 113 ; 19 L. T. 770 ; 17 W. R. 375 ; 9 B. & S. 343 ; affirmed, L. R. 6 Q. B. 1 ; 40 L. J. Q. B. 28 ; 22 L. T. 869 ; 10 B. & S. 1004 48

——— *v.* Homfray (1883), 24 Ch. D. 439 ; 52 L. J. Ch. 833 ; 49 L. T. 5 ; 32 W. R. 6 [C. A.]... 69

——— *v.* Jansen (1798), 2 Esp. 624 112

——— *v.* South Western Rail. Co. (1879), 4 Q. B. D. 406 [C. A.]...77, 81

Pickard *v.* Smith (1861), 10 C. B. (N.S.) 470 ; 4 L. T. 470 64

Pictou (Municipality of) *v.* Geldert, [1893] A. C. 524 ; 63 L. J. P. C. 37 ; 69 L. T. 510 ; 42 W. R. 114 ; 1 R. 447 33

Pinet (F.) et Cie *v.* Maison Louis Pinet, Limited, [1898] 1 Ch. 179 ; 67 L. J. Ch. 41 ; 77 L. T. 613 ; 46 W. R. 506 ; 14 T. L. R. 87 ; 15 R. P. C. 65 ... ... 158, 159

Pippin *v.* Sheppard (1822), 11 Price, 400 ; 25 R. R. 746 39

Pittard *v.* Oliver, [1891] 1 Q. B. 474 ; 55 J. P. 100 ; 60 L. J. Q. B. 219 ; 64 L. T. 758 ; 39 W. R. 311 [C. A.] 128

Polley *v.* Fordham, [1904] 2 K. B. 345 ; 68 J. P. 321 ; 73 L. J. K. B. 687 ; 90 L. T. 755 ; 53 W. R. 188 ; 20 T. L. R. 435 ...23, 99

——— *v.* Fordham (No. 2) (1904), 68 J. P. 504 ; 91 L. T. 525 ; 20 T. L. R. 639 23

Polsue and Alfieri, Limited *v.* Rushmer, [1907] A. C. 121 ; 76 L. J. Ch. 365 ; 96 L. T. 510 ; 23 T. L. R. 362 228

Pomfret *v.* Rycroft (1671), 1 Saund. 321 268

Ponting *v.* Noakes, [1894] 2 Q. B. 281 ; 58 J. P. 559 ; 63 L. J. Q. B. 549 ; 70 L. T. 842 ; 42 W. R. 506 ; 10 R. 265 195

Popplewell *v.* Hodkinson (1869), L. R. 4 Ex. 248 ; 38 L. J. Ex. 126 ; 20 L. T. 578 ; 17 W. R. 806 ... ... 239, 240

Potter *v.* Faulkner (1861), 1 B. & S. 800 ; 31 L. J. Q. B. 30 ; 5 L. T. 455 ; 10 W. R. 93 ; 8 Jur. (N.S.) 259 208

Poulton *v.* London and South Western Rail. Co. (1867), L. R. 2 Q. B. 534 ; 36 L. J. Q. B. 294 ; 17 L. T. 11 ; 16 W. R. 309 ; 8 B. & S. 616 59

Powell *v.* Fall (1880), 5 Q. B. D. 597 ; 49 L. J. Q. B. 428 ; 43 L. T. 562 [C. A.] 201

Praed *v.* Graham (1889), 24 Q. B. D. 53 ; 59 L. J. Q. B. 230 ; 38 W. R. 103 [C. A.] 77

PAGE

Préfontaine *v.* Grenier, [1907] A. C. 101 ; 76 L. J. P. C. 4 ; 95 L. T. 623 ; 23 T. L. R. 27 ; 13 Manson, 401 166
Preston *v.* Luck (1884), 27 Ch. D. 497 88
Pretty *v.* Bickmore (1873), L. R. 8 C. P. 401 ; 28 L. T. 704 ; 21 W. R. 733 ... ... 221, 223
Priestley *v.* Fowler (1837), 7 L. J. Ex. 42 ; 3 M. & W. 1 ; M. & H. 305 ; 1 Jur. 987 ; 49 R. R. 495 205
Prudential Assurance Co. *v.* Knott (1875), L. R. 10 Ch. 142 ; 44 L. J. Ch. 192 ; 31 L. T. 866 ; 23 W. R. 249 89
Pullman *v.* Hill & Co., [1891] 1 Q. B. 524 ; 60 L. J. Q. B. 299 ; 64 L. T. 691 ; 39 W. R. 263 [C. A.] 115, 123
Pursell *v.* Horn (1838), 8 A. & E. 602 251
Pym *v.* Great Northern Rail. Co. (1863), 4 B. & S. 396 ; 32 L. J. Q. B. 377 ; 8 L. T. 734 ; 11 W. R. 922 ; 10 Jur. (N.S.) 199 ...73, 74

Q.

Quarman *v.* Burnett (1840), 9 L. J. Ex. 308 ; 6 M. & W. 499 ; 4 Jur. 969 ; 55 R. R. 717 57
Quartz Hill Gold Mining Co. *v.* Eyre (1883), 11 Q. B. D. 674 ; 52 L. J. Q. B. 488 ; 49 L. T. 249 ; 31 W. R. 668 [C. A.]: 133, 141
Quinn *v.* Leathem, [1901] A. C. 495 ; 65 J. P. 708 ; 70 L. J. P. C. 76 ; 85 L. T. 289 ; 50 W. R. 139 ... ... 15, 153—157

R.

R. *v.* Burdett (1820), 4 B. & Ald. 95 ; 22 R. R. 539 114
— *v.* Ivens (1835), 7 C. & P. 213 268
— *v.* Jackson, [1891] 1 Q. B. 671 ; 55 J. P. 246 ; 60 L. J. Q. B. 346 ; 64 L. T. 679 ; 39 W. R. 407 256
— *v.* Pease (1832), 2 L. J. M. C. 26 ; 4 B. & Ad. 30 ; 1 Nev. & M. 690 ; 38 R. R. 207 219
— *v.* Rosewell (1699), 2 Salk. 259 236
— *v.* Train (1862), 2 B. & S. 640 ; 31 L. J. M. C. 169 ; 10 W. R. 539 ; 3 F. & F. 22 ; 8 Jur. (N.S.) 1151 ; 9 Cox C. C. 180 ... 219
— *v.* Ward (1836), 4 A. & E. 384 219
Radley *v.* London and North Western Rail. Co. (1876), 1 App. Cas. 754 ; 46 L. J. Ex. 573 ; 35 L. T. 637 ; 25 W. R. 147 181
Ratcliffe *v.* Evans, [1892] 2 Q. B. 524 ; 56 J. P. 837 ; 61 L. J. Q. B. 535 ; 66 L. T. 794 ; 40 W. R. 578 [C. A.] 109, 130
Rawlings *v.* Till (1837), 3 M. & W. 28 251
Rawstron *v.* Taylor (1855), 25 L. J. Ex. 33 ; 11 Ex. 369 247
Read *v.* Coker (1853), 13 C. B. 850 ; 22 L. J. C. P. 201 ; 1 W. R. 413 ; 1 C. L. R. 746 ; 17 Jur. 990 250
—— *v.* Edwards (1864), 34 L. J. C. P. 31 ; 11 L. T. 311 ; 5 N. R. 48 ; 17 C. B. (N.S.) 245 284
—— *v.* Great Eastern Rail. Co. (1868), L. R. 3 Q. B. 555 ; 37 L. J. Q. B. 278 ; 18 L. T. 82 ; 16 W. R. 1040 ; 9 B. & S. 714 ...73, 74
Readhead *v.* Midland Rail. Co. (1869), L. R. 4 Q. B. 379 ; 38 L. J. Q. B. 169 ... ... 170, 171
Reddaway *v.* Banham, [1896] A. C. 199 ; 65 L. J. Q. B. 381 ; 74 L. T. 289 ; 44 W. R. 638 158
———— *v.* Bentham Hemp-Spinning Co., [1892] 2 Q. B. 639 ; 67 L. T. 301 [C. A.] 158
Reddie *v.* Scoolt (1794), 1 Peake, 240 149
Redgrave *v.* Hurd (1881), 20 Ch. D. 1 ; 51 L. J. Ch. 118 ; 45 L. T. 489 ; 30 W. R. 251 [C. A.] 164

PAGE

Reed *v.* Nutt (1890), 24 Q. B. D. 669 ; 54 J. P. 599 ; 59 L. J. Q. B. 311 ; 62 L. T. 635 ; 38 W. R. 621... 264
Reedie *v.* London and North Western Rail. Co., Hobbit *v.* Same (1849), 20 L. J. Ex. 65 ; 4 Ex. 244 ; 6 Rail. Cas. 184 66
Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685 ; 58 L. J. Ch. 787 ; 61 L. T. 328 ; 38 W. R. 10... 229
Rhodes *v.* Smethurst (1838), 7 L. J. Ex. 273 ; 4 M. & W. 42 ; 1 H. & H. 237 ; 2 Jur. 893 97
Rice *v.* Reed, [1900] 1 Q. B. 54 ; 69 L. J. Q. B. 33 ; 81 L. T. 410 [C. A.] 290
Rich *v.* Basterfield (1847), 4 C. B. 783 ; 6 L. J. C. P. 273 ; 2 Car. & K. 257 ; 11 Jur. 696 ; 72 R. R. 716 232
Richards *v.* Jenkins (1886), 17 Q. B. D. 544 275
Richardson *v.* Atkinson (1723), 1 Stra. 576 281
——— *v.* Silvester (1873), L. R. 9 Q. B. 34 ; 43 L. J. Q. B. 1 ; 29 L. T. 395 ; 22 W. R. 74 163
Robbins *v.* Jones (1863), 15 C. B. (N.S.) 221 220
Roberts *v.* Roberts (1864), 5 B. & S. 384 ; 33 L. J. Q. B. 249 ; 10 L. T. 602 ; 12 W. R. 909 ; 10 Jur. (N.S.) 1027 109
——— *v.* Rose (1865), L. R. 1 Ex. 82 ; 35 L. J. Ex. 62 ; 13 L. T. 471 ; 14 W. R. 225 ; 4 H. & C. 103 ; 12 Jur. (N.S.) 78... ... 235
Rodgers *v.* Nowill (1847), 5 C. B. 109 ; 17 L. J. C. P. 52 ; 11 Jur. 1039 ... ... 158, 159
Romney Marsh (Bailiffs) *v.* Trinity House (1870), L. R. 5 Ex. 204 ; 17
Roope *v.* D'Avigdor (1883), 10 Q. B. D. 412 ; 47 J. P. 248 ; 48 L. T. 761 30
Rooth *v.* Wilson (1817), 1 B. & A. 59 285
Rose *v.* Buckett, [1901] 2 K. B. 449 ; 70 L. J. K. B. 736 ; 84 L. T. 670 ; 50 W. R. 8 [C. A.] 71
Rosewell *v.* Prior (1702), 2 Salk. 460 ... ... 231, 232
Rourke *v.* White Moss Co. (1877), 2 C. P. D. 205 ; 46 L. J. C. P. 283 ; 36 L. T. 49 ; 25 W. R. 263 [C. A.]... 58
Rowbotham *v.* Wilson (1860), 30 L. J. Q. B. 49 ; 2 L. T. 642 ; 8 H. L. Cas. 348 ; 6 Jur. (N.S.) 965 239
Rowland *v.* Wright (1908), 77 L. J. K. B. 1071 ; 24 T. L. R. 852 [C. A.] 214
Royal Aquarium and Summer and Winter Garden Society *v.* Parkinson, [1892] 1 Q. B. 431 ; 56 J. P. 404 ; 61 L. J. Q. B. 409 ; 66 L. T. 513 ; 40 W. R. 450 [C. A.] 124, 128
Royal Baking Powder Co. *v.* Wright, Crossley & Co. (1898), 15 R. P. C. 677 111
Ruabon Brick and Terra Cotta Co. *v.* Great Western Rail. Co., [1893] 1 Ch. 427 ; 62 L. J. Ch. 483 ; 68 L. T. 110 ; 41 W. R. 418 ; 2 R. 237 240
Rushmer *v.* Polsue and Alfieri, Limited (1905), 21 T. L. R. 183 ... 230
Russell *v.* Men of Devon, 2 T. R. 667 33
——— *v.* Shenton (1842), 3 Q. B. 449 ; 11 L. J. Q. B. 289 ; 2 G. & D. 573 ; 6 Jur. 1059 ; 61 R. R. 249 ... ... 231, 232
Rust *v.* Victoria Graving Dock Co. and London and St. Katherine's Dock Co. (1887), 36 Ch. D. 113 ; 56 L. T. 216 ; 35 W. R. 673... 78
Ryan *v.* Clark (1849), 14 Q. B. 65 ... ... 269, 270
Rylands *v.* Fletcher (1868), L. R. 3 H. L. 330 ; 37 L. J. Ex. 161 ; 19 L. T. 220 ... ... 191, 193

S.

Sadgrove *v.* Hole, [1901] 2 K. B. 1 ; 70 L. J. K. B. 455 ; 84 L. T. 647 ; 49 W. R. 473 [C. A.]... 115

PAGE
Sadler *v.* Great Western Rail. Co., [1896] A. C. 450; 65 L. J. Q. B. 462; 74 L. T. 561; 45 W. R. 51 50
——— *v.* South Staffordshire and Birmingham District Steam Tramways Co. (1889), 23 Q. B. D. 17; 53 J. P. 694; 58 L. J. Q. B. 421; 37 W. R. 582 [C. A.] 252
St. Helen's Smelting Co. *v.* Tipping (1865), 35 L. J. Q. B. 66; 12 L. T. 776; 13 W. R. 1083; 11 H. L. Cas. 642; 11 Jur. (N.S.) 785: 228, 229
Salt Union *v.* Brunner, Mond & Co., [1906] 2 K. B. 822; 76 L. J. K. B. 55; 95 L. T. 647; 22 T. L. R. 835 240
Saunders *v.* Holborn District Board of Works, [1895] 1 Q. B. 64; 59 J. P. 453; 64 L. J. Q. B. 101; 71 L. T. 519; 43 W. R. 26; 15 R. 25 33
——— *v.* Merryweather (1865), 35 L. J. Ex. 115; 13 W. R. 814; 3 H. & C. 902; 11 Jur. (N.S.) 655 275
Saxby *v.* Manchester and Sheffield Rail. Co. (1869), L. R. 4 C. P. 198; 38 L. J. C. P. 153; 19 L. T. 640; 17 W. R. 293 232
Sayers *v.* Collyer (1884), 28 Ch. D. 103; 49 J. P. 244; 54 L. J. Ch. 1; 51 L. T. 723; 33 W. R. 91 88
Scott *v.* London Dock Co. (1865), 34 L. J. Ex. 220; 13 L. T. 148; 13 W. R. 410; 3 H. & C. 596; 11 Jur. (N.S.) 204: 185, 186
—— *v.* Nixon (1843), 3 Dru. & War. 388; 2 Con. & L. 185; 6 Ir. Eq. R. 8 96
—— *v.* Sampson (1882), 8 Q. B. D. 491; 46 J. P. 408; 51 L. J. Q. B. 380; 46 L. T. 412; 30 W. R. 541 84
—— *v.* Shepherd (1763), 2 Wm. Bl. 892; 3 Wils. K. B. 403 ... 19
—— *v.* Stansfield (1868), L. R. 3 Ex. 220; 37 L. J. Ex. 155; 18 L. T. 572; 16 W. R. 911 [C. A.] 21, 122
Seaman *v.* Netherclift (1876), 2 C. P. D. 53; 46 L. J. C. P. 128; 35 L. T. 784; 25 W. R. 159 [C. A.] 122
Semayne's Case (1605), 5 Co. Rep. 91 c 268
Senior *v.* Ward (1859), 1 El. & El. 385; 28 L. J. Q. B. 139; 7 W. R 261; 5 Jur. (N.S.) 172 205
Seroka *v.* Kattenburg (1886), 17 Q. B. D. 177; 55 L. J. Q. B. 375; 54 L. T. 649; 34 W. R. 543 ... ... 51, 52
Serrao *v.* Noel (1885), 15 Q. B. D. 549 [C. A.] 88
Sharp *v.* Powell (1872), L. R. 7 C. P. 253; 41 L. J. C. P. 95; 26 L. T. 436; 20 W. R. 584 17
Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287; 64 L. J. Ch. 216; 72 L. T. 34; 43 W. R. 238; 12 R. 112 [C.A.]: 88
Shepheard *v.* Whitaker (1875), L. R. 10 C. P. 502; 32 L. T. 402 ... 107
Simmons *v.* Mitchell (1880), 6 App. Cas. 156; 45 J. P. 237; 50 L. J. P. C. 11; 43 L. T. 710; 29 W. R. 401 111
Simpson *v.* Savage (1856), 1 C. B. (N.S.) 347; 26 L. J. C. P. 50; 5 W. R. 147; 3 Jur. (N.S.) 161 234
"Singer" Machine Manufacturers *v.* Wilson (1877), 3 App. Cas. 376; 47 L. J. Ch. 481; 38 L. T. 303; 26 W. R. 664 ... ... 158, 159
Six Carpenters' Case (1611), 1 Sm. L. C. 132; 8 Coke, 146a: 268, 269
Slater *v.* Swann (1730), 2 Stra. 872 283
Smith *v.* Baker (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; 28 L. T. 637 289
—— *v.* Baker & Sons, [1891] A. C. 325; 55 J. P. 660; 60 L. J. Q. B. 683; 65 L. T. 467; 40 W. R. 392 ... ... 187, 189
—— *v.* Chadwick (1884), 9 App. Cas. 187; 48 J. P. 644; 53 L. J. Ch. 873; 50 L. T. 697; 32 W. R. 687 163
—— *v.* Giddy, [1904] 2 K. B. 448; 73 L. J. K. B. 894; 91 L. T. 296; 20 T. L. R. 596 227
—— *v.* Kaye (1904), 20 T. L. R. 261 145
—— *v.* Lloyd (1854), 23 L. J. Ex. 194; 9 Ex. 562; 2 C. L. R. 208; 2 W. R. 271 277

PAGE

Smith *v.* London and South Western Rail. Co. (1870), L. R. 6 C. P. 14; 40 L. J. C. P. 21; 23 L. T. 678; 19 W. R. 230: 27, 201, 202

—— *v.* Marrable (1843), 12 L. J. Ex. 223; 11 M. & W. 5; Car. & M. 479... 172

—— *v.* Thackerah (1866), L. R. 1 C. P. 564; 35 L. J. C. P. 276; 14 L. T. 761; 14 W. R. 832; 12 Jur. (N.S.) 545; 1 H. & R. 615: 239

Snag *v.* Gee (1597), 4 Co. Rep. 16 a 110

Soltau *v.* De Held (1851), 21 L. J. Ch. 153; 16 Jur. 326; 2 Sim. (N.S.) 133 ... ... 89, 217

Southee *v.* Denny (1847), 17 L. J. Ex. 151; 1 Ex. 196 112

South Hetton Coal Co. *v.* North Eastern News Association, [1894] 1 Q. B. 133; 58 J. P. 196; 63 L. J. Q. B. 293; 68 L. T. 844; 42 W. R. 322; 9 R. 240 [C. A.] 105, 108

South Staffordshire Water Co. *v.* Sharman, [1896] 2 Q. B. 44; 65 L. J. Q. B. 460; 74 L. T. 761; 44 W. R. 653 288

Spackman *v.* Foster (1883), 11 Q. B. D. 99; 47 J. P. 455; 52 L. J. Q. B. 418; 48 L. T. 670; 31 W. R. 548 96

Spark *v.* Heslop (1859), 1 El. & El. 563; 28 L. J. Q. B. 197; 7 W. R. 312; 5 Jur. (N.S.) 730 81

Speight *v.* Gosnay (1891), 55 J. P. 501; 60 L. J. Q. B. 231 [C. A.]... 110

Spoor *v.* Green (1874), L. R. 9 Ex. 99; 43 L. J. Ex. 57; 30 L. T. 393; 22 W. R. 547 95

Stanley *v.* Powell, [1891] 1 Q. B. 86; 55 J. P. 327; 60 L. J. Q. B. 52; 63 L. T. 809; 39 W. R. 76 ... ... 14, 252

Stedman *v.* Smith (1857), 8 El. & B. 1; 26 L. J. Q. B. 314; 3 Jur. (N.S.) 1248 272

Stevens *v.* Chown, Stevens *v.* Clark, [1901] 1 Ch. 894; 65 J. P. 470; 70 L. J. Ch. 571; 84 L. T. 796; 49 W. R. 460; 17 T. L. R. 313 31

—— *v.* Midland Rail. Co. (1854), 10 Ex. 352; 23 L. J. Ex. 328; 18 Jur. 932; 2 C. L. R. 1300 137

Stockdale *v.* Hansard (1839), 8 L. J. Q. B. 294; 9 A. & E. 1; 2 P. & D. 1; 3 Jur. 905; 48 R. R. 326 121

Stone, *Ex parte*, *Re* Giles (1889), 61 L. T. 82; 37 W. R. 767; 6 Morrell, 158 71

—— *v.* Cartwright (1795), 6 T. R. 411; 3 R. R. 220 63

Storey *v.* Ashton (1869), L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; 10 B. & S. 337; 17 W. R. 727 58

Street *v.* Tugwell (1800), Selwyn's N. P., 13th ed., 1070 227

—— *v.* Licensed Victuallers' Society (1874), 22 W. R. 553 ... 114

Stroyan *v.* Knowles, Hamer *v.* Same (1861), 6 H. & N. 454 ... 241, 242

Stuart *v.* Bell, [1891] 2 Q. B. 311; 60 L. J. Q. B. 577; 64 L. T. 633; 39 W. R. 612 [C. A.] 123, 125

—— *v.* Evans (1883), 49 L. T. 138; 31 W. R. 706 210

Sturges *v.* Bridgman (1879), 11 Ch. D. 852; 48 L. J. Ch. 785; 41 L. T. 219; 28 W. R. 200 [C. A.] 231, 234

Swainson *v.* North-Eastern Rail. Co. (1878), 3 Ex. D. 341; 47 L. J. Ex. 372; 38 L. T. 201; 26 W. R. 413 [C. A.] 207

Swansea Vale, *The* (Owners) *v.* Rice (1911), 27 T. L. R. 440; 55 Sol. J. 497 213

Swift *v.* Jewsbury (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; 30 L. T. 31; 22 W. R. 319... ... ... 54, 163

—— *v.* Winterbotham (1873), L. R. 8 Q. B. 244; 42 L. J. Q. B. 111; 28 L. T. 339; 21 W. R. 562... 163

Swire *v.* Leach (1865), 18 C. B. (N.S.) 479 289

Sydney Municipal Council *v.* Bourke, [1895] A. C. 433; 59 J. P. 659; 64 L. J. P. C. 140; 72 L. T. 605; 11 R. 482 33

Sykes *v.* North Eastern Rail. Co. (1875), 44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473 74

T.

PAGE

Taff Vale Railway *v.* Amalgamated Society of Railway Servants, [1901] A. C. 426 ; 65 J. P. 596 ; 70 L. J. K. B. 905 ; 85 L. T. 147 ; 50 W. R. 44 48
Tancred *v.* Allgood (1859), 28 L. J. Ex. 362 ; 4 H. & N. 438 ... 284
Tarleton *v.* M'Gawley (1793), 1 Peake, 205 ; 3 R. R. 689 155
Tarrant *v.* Webb (1856), 18 C. B. 797 ; 25 L. J. C. P. 261 ; 4 W. R. 640 204
Tarry *v.* Ashton (1876), 1 Q. B. D. 314 ; 45 L. J. Q. B. 260 ; 34 L. T. 97 ; 24 W. R. 581 ... ... 67, 219
Taunton *v.* Costar (1797), 7 T. R. 431 ; 4 R. R. 481 269
Taylor *v.* Hawkins (1851), 16 Q. B. 308 ; 20 L. J. Q. B. 313 ; 15 Jur. 746 125
——— *v.* Manchester, etc. Rail. Co., [1895] 1 Q. B. 134 ; 59 J. P. 100 ; 64 L. J. Q. B. 6 ; 71 L. T. 596 ; 43 W. R. 120 ; 14 R. 34 [C. A.] 38, 170
Temperton *v.* Russell, [1893] 1 Q. B. 715 ; 57 J. P. 676 ; 62 L. J. Q. B. 412 ; 69 L. T. 78 ; 41 W. R. 565 ; 4 R. 376 [C. A.] ... 153, 154
Tenant *v.* Goldwin (1704) 1 Salk. 360 ; 2 Ld. Raym. 1089 192
Terry *v.* Hutchinson (1868), L. R. 3 Q. B. 599 ; 37 L. J. Q. B. 257 ; 18 L. T. 521 ; 16 W. R. 932 ; 9 B. & S. 487 ... ... 149, 150
Tharpe *v.* Stallwood (1843), 12 L. J. C. P. 241 ; 5 M. & G. 760 ; 6 Sco. N. R. 715 ; 7 Jur. 492 ; 1 D. & L. 24 ; 73 R. R. 974 ... 285
Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685 ; 51 J. P. 516 ; 56 L. J. Q. B. 340 ; 57 L. T. 537 ; 35 W. R. 555 [C. A.] : 28, 211
Thompson *v.* Bernard (1807), 1 Camp. 48 110
——— *v.* Brighton Corporation, Oliver *v.* Horsham Local Board, [1894] 1 Q. B. 332 ; 58 J. P. 297 ; 63 L. J. Q. B. 181 ; 70 L. T. 206 ; 42 W. R. 161 ; 9 R. 111 ... 34
——— *v.* Ross (1858), 29 L. J. Ex. 1 ; 1 L. T. 43 ; 8 W. R. 44 ; 5 H. & N. 16 ; 5 Jur. (N.S.) 1133 148
Thorley's Cattle Food Co. *v.* Massam (1880), 14 Ch. D. 763 ; 42 L. T. 851 ; 28 W. R. 966 90
Thorne *v.* Heard, [1894] 1 Ch. 599 ; affirmed, [1895] A. C. 495 ; 64 L. J. Ch. 652 ; 73 L. T. 291 ; 44 W. R. 155 ; 11 R. 254 ... 94
Thorogood *v.* Bryan (1849), 8 C. B. 115 ; 18 L. J. C. P. 336 ... 183
Thorpe *v.* Brumfitt (1873), L. R. 8 Ch. 650 248
Tillett *v.* Ward (1882), 10 Q. B. D. 17 ; 47 J. P. 438 ; 52 L. J. Q. B. 61 ; 47 L. T. 546 ; 31 W. R. 197 198
Tilling (T.), Limited *v.* Dick, Kerr & Co., Limited, [1905] 1 K. B. 562 ; 74 L. J. K. B. 359 ; 53 W. R. 380 ; 21 T. L. R. 281 ... 99
Timothy *v.* Simpson (1835), 4 L. J. M. C. 73 ; 1 Cr. M. & R. 757 ; 5 Tyr. 244 ; 6 Car. & P. 499 ; 40 R. R. 722 262
Tipping *v.* St. Helen's Smelting Co. (1865), L. R. 1 Ch. 66 ... 88, 226
Todd *v.* Flight (1860), 9 C. B. (N.S.) 377 ; 30 L. J. C. P. 21 ; 3 L. T. 325 ; 9 W. R. 145 ; 7 Jur. (N.S.) 291 ... ... 227, 231, 232
Toogood *v.* Spyring (1834), 3 L. J. Ex. 347 ; 1 C. M. & R. 181 ; 4 Tyr. 582 ; 40 R. R. 523 123
Trinidad Asphalte Co. *v.* Ambard, [1899] 2 Ch. 260 n ; A. C. 594 ; 68 L. J. P. C. 114 ; 81 L. T. 132 ; 48 W. R. 116 240
Tubervil *v.* Stamp (1697), 1 Salk. 213 200
Tuberville *v.* Savage (1669), 1 Mod. 3 251
Tuff *v.* Warman (1857), 2 C. B. (N.S.) 740, affirmed (1858), 5 C. B. (N.S.) 573 ; 27 L. J. C. P. 322 ; 6 W. R. 693 ; 5 Jur. (N.S.) 222 : 182
Tullidge *v.* Wade (1769), 3 Wils. 18 ... ... 78, 84, 151, 265
Turner *v.* Doe *d.* Bennett (1842), 11 L. J. Ex. 453 ; 9 M. & W. 643 ; 60 R. R. 850 275

PAGE
Turner *v.* Stallibrass, [1898] 1 Q. B. 56 ; 67 L. J. Q. B. 52 ; 77 L. T. 482 ; 46 W. R. 81 [C. A.] 38, 177
Turton *v.* Turton (1889), 42 Ch. D. 128 ; 61 L. T. 571 ; 38 W. R. 22 [C. A.] 158, 159
Twycross *v.* Grant (1878), 4 C. P. D. 40 ; 48 L. J. C. P. 1 ; 39 L. T. 616 ; 27 W. R. 87 [C. A.] 70

U.

United Merthyr Collieries Co., *Re* (1872), L. R. 15 Eq. 46 ; 21 W. R. 117 79

V.

Vaughan *v.* Menlove (1837), 6 L. J. C. P. 92 ; 3 Bing. N. C. 468 ; 4 Scott, 244 ; 3 Hodges, 51 ; 1 Jur. 215 ; 43 R. R. 711 ... ... 200, 201
——— *v.* Taff Vale Rail. Co. (1860), 29 L. J. Ex. 247 ; 2 L. T. 394 ; 8 W. R. 519 ; 5 H. & N. 679 ; 6 Jur. (N.S.) 899 ... 26, 202
Venables *v.* Smith (1877), 2 Q. B. D. 279 ; 46 L. J. Q. B. 470 ; 36 L. T. 509 ; 25 W. R. 584 57
Vere *v.* Cawdor (Lord) (1809), 11 East, 568 ; 11 R. R. 268 283
Verry *v.* Watkins (1836), 7 C. & P. 508 ... ... 84, 151
Vine, *Ex parte*, *Re* Wilson (1878), 8 Ch. D. 364 ; 47 L. J. Bk. 116 ; 38 L. T. 730 ; 26 W. R. 582 [C. A.] 70, 71
Vizetelli *v.* Mudie's Select Library, Limited, [1900] 2 Q. B. 170 ; 69 L. J. Q. B. 645 [C. A.] 117

W.

Waite *v.* North Eastern Rail. Co. (1858), El. B. & E. 719 ; 28 L. J. Q. B. 258 ; 7 W. R. 311 184
Wakelin *v.* London and South Western Rail. Co. (1886), 12 App. Cas. 41 ; 51 J. P. 404 ; 56 L. J. Q. B. 229 ; 55 L. T. 709 ; 35 W. R. 141 186
Wakley *v.* Cooke (1849), 19 L. J. Ex. 91 ; 4 Ex. 518 107
Walker *v.* Brewster (1867), L. R. 5 Eq. 25 ; 37 L. J. Ch. 33 ; 17 L. T. 135 ; 16 W. R. 59 227
——— *v.* Brogden (1865), 19 C. B. (N.S.) 65 ; 12 L. T. 495 ; 13 W. R. 809 ; 11 Jur. (N.S.) 671 104
——— *v.* Great Northern Rail. Co. (1891), 28 L. R. Ir. 69... ... 46
Waller *v.* Loch (1881), 7 Q. B. D. 619 ; 46 J. P. 484 ; 51 L. J. Q. B. 274 ; 45 L. T. 242 ; 30 W. R. 18 [C. A.] 125
Walley *v.* Holt (1876), 35 L. T. 631 47
Wallis *v.* Hands, [1893] 2 Ch. 75 ; 62 L. J. Ch. 586 ; 68 L. T. 428 ; 41 W. R. 471 ; 3 R. 351 270
Walter *v.* Selfe (1851), 20 L. J. Ch. 433 ; 4 De G. & Sm. 315 ; 15 Jur. 416 226
Walton *v.* Waterhouse (1672), 2 Wms. Saund. 420 275
Warburton *v.* Great Western Rail. Co. (1866), L. R. 2 Ex. 30 ; 36 L. J. Ex. 9 ; 15 L. T. 361 ; 15 W. R. 108 ; 4 H. & C. 695... 207
Ward *v.* Weeks (1830), 9 L. J. (O.S.) C. P. 6 ; 4 Moo. & P. 808 ; 7 Bing. 211 116
Warner *v.* Riddiford (1858), 4 C. B. (N.S.) 180 253
Warwick *v.* Foulkes (1844), 13 L. J. Ex. 109 ; 12 M. & W. 507 ; 1 D. & L. 638 ; 8 Jur. 85 84

PAGE
Wason *v.* Walter (1868), L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 19 L. T. 409; 17 W. R. 169; 8 B. & S. 671 121
Watkin *v.* Hall (1868), L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 18 L. T. 561; 16 W. R. 857; 9 B. & S. 279 115
Watkins *v.* Naval Colliery Co. (1897), Limited, [1911] 2 K. B. 162; 80 L. J. K. B. 746; 104 L. T. 439; 55 Sol. J. 347 [C. A.] ... 205
Watson *v.* Holliday (1882), 20 Ch. D. 780; 51 L. J. Ch. 906; 46 L. T. 878; 30 W. R. 747; affirmed, 52 L. J. Ch. 543; 48 L. T. 545; 31 W. R. 536 71
——— *v.* M'Ewan, [1905] A. C. 480; 74 L. J. P. C. 151; 93 L. T. 489: 122
Watt *v.* Watt, [1905] A. C. 115; 69 J. P. 249; 74 L. J. K. B. 438; 92 L. T. 480; 53 W. R. 547; 21 T. L. R. 386 78
Wear Commissioners *v.* Adamson (1876), 1 Q. B. D. 546; 2 App. Cas. 743; 47 L. J. Q. B. 193; 37 L. T. 543; 26 W. R. 217; affirmed (1877), 2 App. Cas. 743 12
Webb *v.* Beavan (1883), 11 Q. B. D. 609; 47 J. P. 488; 52 L. J. Q. B. 544; 49 L. T. 201 ... ... 108, 110
——— *v.* Bird (1863), 13 C. B. (N.S.) 841; 31 L. J. C. P. 335; 8 Jur. (N.S.) 621 ... ... 243, 244
Weblin *v.* Ballard (1886), 17 Q. B. D. 122; 50 J. P. 597; 55 L. J. Q. B. 395; 54 L. T. 532; 34 W. R. 455 210
Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554; 41 L. J. Q. B. 306; 26 L. T. 326; 20 W. R. 659... ... ...29, 30
——— *v.* Head (1831), 4 C. & P. 568; 34 R. R. 819 283
Wenman *v.* Ash (1853), 13 C. B. 836; 22 L. J. C. P. 190; 1 W. R. 452; 1 C. L. R. 592; 17 Jur. 579... 115
Wennhak *v.* Morgan (1888), 20 Q. B. D. 635; 52 J. P. 470; 57 L. J. Q. B. 241; 59 L. T. 28; 36 W. R. 697 115
Western Counties Manure Co. *v.* Lawes Chemical Manure Co. (1874), L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5... 130
Weston *v.* Beeman (1857), 27 L. J. Ex. 57 134
Whalley *v.* Lancashire and Yorkshire Rail. Co. (1884), 13 Q. B. D. 131; 48 J. P. 500; 53 L. J. Q. B. 285; 50 L. T. 272; 32 W. R. 711 [C. A.] 194
Wheeler *v.* Whiting (1840), 9 C. & P. 262; 62 R. R. 749 255
Whitbourne *v.* Williams, [1901] 2 K. B. 722; 70 L. J. K. B. 933; 85 L. T. 271 [C. A.]... 148
White *v.* France (1877), 2 C. P. D. 308; 46 L. J. C. P. 823; 25 W. R. 878 ... ... 13, 174
——— *v.* Mellin, [1895] A. C. 154; 59 J. P. 628; 64 L. J. Ch. 308; 72 L. T. 334; 43 W. R. 353; 11 R. 141 ... 111, 130
——— *v.* Spettigue (1845), 14 L. J. Ex. 99; 13 M. & W. 603; 1 Car. & K. 673; 9 Jur. 70; 67 R. R. 753 ... ...29, 30
——— (John) & Sons *v.* White (J. & M.), [1906] A. C. 72; 75 L. J. P. C. 14; 94 L. T. 64 246
Whitehouse *v.* Fellowes (1861), 10 C. B. (N.S.) 765; 30 L. J. C. P. 305; 4 L. T. 177; 9 W. R. 557 ... ...96, 97
Whitmores (Edenbridge), Limited *v.* Stanford, [1909] 1 Ch. 427; 78 L. J. Ch. 144; 99 L. T. 924; 25 T. L. R. 169; 53 Sol. J. 134 ... ... 195, 246
Whitwham *v.* Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538; 65 L. J. Ch. 741; 74 L. T. 804; 44 W. R. 698 [C. A.]... 79
Whyler *v.* Bingham Rural Council, [1901] 1 K. B. 45; 64 J. P. 77; 70 L. J. K. B. 207; 83 L. T. 652; 17 T. L. R. 23 [C. A.]... 34
Wilkinson *v.* Downton, [1897] 2 Q. B. 57; 66 L. J. Q. B. 493; 76 L. T. 493; 45 W. R. 525... ... ... 81, 164
——— *v.* Haygarth (1847), 12 Q. B. 837; 16 L. J. Q. B. 103; 11 Jur. 104 272
Williams *v.* Birmingham Battery and Metal Co., [1899] 2 Q. B. 338; 68 L. J. Q. B. 918; 81 L. T. 62; 47 W. R. 680 [C. A.]: 188, 189, 205, 207

PAGE
Williams *v.* Mason (1874), 28 L. T. 232 163
——— *v.* Mersey Docks and Harbour Board, [1905] 1 K. B. 804; 60 J. P. 196; 74 L. J. K. B. 481; 92 L. T. 44; 53 W. R. 488; 21 T. L. R. 397; 3 L. G. R. 529 [C. A.] 73, 99
Williamson *v.* Price (1874), L. R. 9 C. P. 555; 43 L. J. C. P. 166; 30 L. T. 382; 22 W. R. 578 ... ... 15, 196
Willis *v.* Maclachlan (1876), 1 Ex. D. 376; 45 L. J. Q. B. 689; 35 L. T. 218 23
Wilson *v.* Finch Hatton (1877), 2 Ex. D. 336; 46 L. J. Ex. 489; 36 L. T. 478; 25 W. R. 537 172
——— *v.* Newberry (1871), L. R. 7 Q. B. 31; 41 L. J. Q. B. 31; 25 L. T. 695; 20 W. R. 111 195
——— *v.* Tumman (1843), 12 L. J. C. P. 8; 6 Man. & Gr. 242; 6 Sco. N. R. 894; 1 D. & L. 573; 64 R. R. 770 53
Wing *v.* London General Omnibus Co., [1909] 2 K. B. 652; 78 L. J. P. 429; 78 L. J. K. B. 1063; 101 L. T. 411; 25 T. L. R. 729; 53 Sol. J. 713; 7 L. G. R. 1093 [C. A.] 186
Wingate *v.* Waite (1840), 9 L. J. Ex. 319; 6 M. & W. 739; 4 Jur. 860 24
Winkfield, The, [1902] P. 42; 71 L. J. P. 21, 85 L. T. 665, 50 W. R. 246 [C. A.] 285, 289
Winsmore *v.* Greenbank (1745), Willes, 577 145
Winterbottom *v.* Derby (Lord) (1867), L. R. 2 Ex. 316; 36 L. J. Ex. 194; 16 L. T. 771; 16 W. R. 13 ... ... 10, 220
——— *v.* Wright (1842), 11 L. J. Ex. 415; 10 M. & W. 109; 62 R. R. 534 ... ... 40, 168
Wolverhampton New Waterworks Co *v.* Hawkesford (1859), 6 C. B. (N.S.) 703; 28 L. J. C. P. 198; 7 W. R. 244; 5 Jur. (N.S.) 136 ... 31
Wood *v.* Durham (Earl) (1888), 21 Q. B. D. 501; 57 L. J. Q. B. 547; 59 L. T. 142; 37 W. R. 222 ... ... 84, 118
——— *v.* Leadbitter (1845), 14 L. J. Ex. 161; 13 M. & W. 838; 9 Jur. 187 256
——— *v.* Waud (1849), 3 Ex. 748; 18 L. J. Ex. 305; 13 Jur. 742 ... 286
Woodley *v.* Metropolitan District Rail. Co (1877), 2 Ex. D. 384; 46 L. J. Ex. 521; 36 L. T. 479 [C. A.] 189
Worth *v.* Gilling (1866), L. R. 2 C. P. 1 197
Wren *v.* Wild (1869), L. R. 4 Q. B. 730; 38 L. J. Q. B. 327; 20 L. T. 1007; 10 B. & S. 51 130
Wright *v.* Fairfield (1831), 2 B. & Ad. 727 70
——— *v.* London and North Western Rail. Co. (1876), 1 Q. B. D. 252; 45 L. J. Q. B. 370; 33 L. T. 830 [C. A.] ... 209
——— *v.* Williams (1836), 5 L. J. Ex. 107; 1 M. & W. 77; 1 Pyc. & G. 375; 1 Gale, 410; 46 R. R. 265 233
Wyatt *v.* Palmer, [1899] 2 Q. B. 106; 68 L. J. Q. B. 709; 80 L. T. 639; 47 W. R. 549 [C. A.] 141
——— *v.* White (1860), 29 L. J. Ex. 193; 1 L. T. 317; 8 W. R. 307; 5 H. & N. 371 134
Wyld *v.* Pickford (1841), 10 L. J. Ex. 382; 8 M. & W. 443; 58 R. R. 775 287

Y.

Yarmouth *v.* France (1887), 19 Q. B. D. 647; 57 L. J. Q. B. 7; 36 W. R. 281 ... ... 189, 211
Yates *v.* Whyte (1838), 4 Bing. N. C. 272; 5 Scott, 640 85

THE LAW OF TORTS.

INTRODUCTION.

"The maxims of law," says Justinian, "are these: To live honestly, to hurt no man, and to give every one his due." The practical object of law must necessarily be to enforce the observance of these maxims, which is done by punishing the dishonest, causing wrongdoers to make reparation, and insuring to every member of the community the full enjoyment of his rights and possessions.

Infractions of law are, for the purposes of justice, divided into two great classes: viz., public and private injuries. The former consist of offences against the community at large, or offences—commonly called crimes—which, although primarily affecting individuals, are subversive of law and order; and as no redress can be given to the community, except by the prevention of such acts for the future, they are either stopped by injunction at the suit of the Attorney-General, or (in the case of crimes) visited with some deterrent and exemplary punishment.

Private or civil injuries, on the other hand, are merely violations or deprivations of the legal rights of individuals. These admit of redress. The law, therefore, affords a remedy by forcing the wrongdoer to make reparation; and in some cases also restrains him by injunction from repeating the wrong.

But as injuries are divided into criminal and civil, so the latter are sub-divided into two classes, of injuries *ex contractu* and injuries *ex delicto*—the former being such as arise out of the violation of duties undertaken by contract, and the latter (commonly called torts) such as spring

from the violation of duties imposed by law, to the performance or observance of which every member of the community is entitled as against the world at large.

Although, however, these divisions are broadly correct, the border line between them is by no means well defined. Indeed, from the very nature of things, each division must to some extent overlap the others. Thus the same set of circumstances may constitute a crime, a tort, and a breach of contract. At the same time, as those circumstances may be regarded from each of the three points of view, no confusion ensues from the fact that they cannot be exclusively placed in any one of the three classes.

In this Work an attempt has been made to state the principles which the law applies to those facts which constitute torts.

PART I.

RULES RELATING TO TORTS IN GENERAL.

CHAPTER I.

OF THE NATURE OF A TORT.

ART. 1.—*Definition of a Tort.*

A TORT is an act or omission which, independent of contract, is unauthorised by law, and results either—

(a) in the infringement of some absolute right to which another is entitled; or

(b) in the infringement of some qualified right of another causing damage; or

(c) in the infringement of some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally.

No one has yet succeeded in formulating a perfectly satisfactory definition of a Tort; indeed, it may be doubted whether a scientific definition, which would at the same time convey any notion to the mind of the student, is possible.

Comment on various definitions of Tort.

A tort is described in the Common Law Procedure Act, 1852, as "**a wrong independent of contract.**" If we use the word "wrong," as equivalent to violation of a right recognised and enforced by law by means of an action for damages, the definition is sufficiently accurate, but scarcely very lucid; for it gives no clue as to what constitutes a wrong or violation of a right recognised and enforced by law.

Art. 1.

A text book (*a*), by a distinguished American lawyer, defines a tort as a breach of duty fixed by law, and redressible by a suit for damages; but this definition does not seem to convey much information to the reader, and confessedly requires an elaborate explanatory dissertation.

Perhaps Sir Frederick Pollock (*b*) gives the most complete definition; but I cannot help thinking that, excellent as it is, the student is more likely to grasp the legal meaning of the word "tort" from the brief definition which I have attempted.

Examination of author's definition.

It will be perceived from the above definition, that three distinct factors are necessary to constitute a tort according to our law. First, there must be some act or omission on the part of the person committing the tort (the defendant), not being a breach of some duty undertaken by contract. Secondly, the act or omission must not be authorised by law. Thirdly, this wrongful act or omission must, in some way, inflict an injury, special, private, and peculiar to the plaintiff, as distinguished from an injury to the public at large; and this may be either by the violation of some right *in rem*, that is to say, some right to which the plaintiff is entitled as against the world at large, or by the infliction on him of some loss of property, health, or material comfort.

It is desirable at this stage to examine the third of these three factors a little more closely.

One often sees it stated in legal works that a *damnum absque injuriâ* is not actionable, but that an *injuria sine damno* is.

Meaning of "*damnum*" and "*injuria*."

By *damnum* is meant damage in the sense of **substantial** loss of money, comfort, health, or the like. By *injuria* is meant an unauthorised interference, however trivial, with some right conferred by law on the plaintiff (*ex. gr.* the right of excluding others from his house or garden). All that the maxims come to, therefore, is this: that no action

(*a*) Bigelow's Elements of the Law of Torts.
(*b*) See Pollock on Torts, 6th ed., p. 19.

lies for mere damage (*damnum*), however substantial, caused without breach of a legal right; but that an action does lie for interference with another's absolute legal private right, even where unaccompanied by actual damage.

Read by the light of these observations, both the maxims in question are correct. For the interruption of an absolute right, however temporary and however slight, is considered by the law to be damaging, and a proper subject for reparation; and substantial damages have more than once (in cases of false imprisonment) been awarded, where the plaintiff's surroundings were very considerably improved during his unlawful detention. But when no absolute private right has been invaded by a wrongful act, then no action will lie unless the plaintiff has sustained actual loss or damage.

Damnum absque injuria means damage without infringement of any legal right, and it is clear that this is not actionable, even though the damage is caused by an unauthorised act, such as a crime or breach of trust. *Damnum absque injuria.*

For instance, murder is an act unauthorised by law, and it may inflict most cruel and particular damage on the family of the murdered man; but, nevertheless, at common law, that gives them no civil remedy against the murderer (*c*). So, if one libels a dead man, his children have no right to redress, although it may cause them to be cut off from all decent society, for, though a man has in a sense a right to his own reputation, he has none in the reputation of his father. So a breach of trust, although not permitted in equity, and usually followed by private and particular loss to the beneficiaries, is not an infringement of any legal right, and therefore cannot properly be said to constitute a tort.

In the case of the invasion of an absolute private right, there is a wrong done to the plaintiff by the mere infringement of that right, and for every wrong there is a remedy by action "*ubi jus ibi remedium.*" *Injuria sine damno.*

(*c*) See *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.], *post*, p. 73.

Art. 1.

A man has an absolute right to his property, to the immunity of his person, and to his liberty. Thus, in actions of trespass whether to goods, lands, or the person (including assault and false imprisonment), actual damage is not an essential part of the cause of action, and a plaintiff is entitled to damages for the mere infringement of these rights.

nfringement f qualified rivate ights.

But there are some private rights which are only qualified rights, that is, rights to be saved from loss, and no action will lie for an infringement of these rights without proof of actual damage. Thus, a person has not an absolute right not to be deceived, and in an action for fraud it is necessary for the plaintiff to show that the deceit complained of resulted in damage. So, too, in actions for nuisance (with some exceptions), malicious prosecution and negligence, damage is an essential part of the cause of action; as in all these cases the right infringed is only a qualified right—a right to be preserved from damage by certain acts or omissions of other persons.

nfringement f public ights.

Lastly, a tort may consist in the infringement of a public right, *i.e.*, a right which all men enjoy in common, coupled with particular damage. Take, for example, rights of highway. If a highway is obstructed, an injury is done to the public, and for that wrong the remedy is by indictment or by proceedings by the Attorney-General on behalf of the public. If every member of the public could bring an action, the number of possible actions for one breach of duty would be without limit (*d*). But if, in addition to the injury to the public, a special, peculiar and substantial damage is occasioned to an individual beyond the injury suffered by the public generally, then it is only just that he should have some private redress (*e*).

It will, therefore, be seen, that there must be an act or omission either causing (a) an infringement of some absolute private right, or (b) an infringement of a qualified private

(*d*) See *Winterbotham* v. *Lord Derby*, L. R. 2 Ex. 316; *W. H. Chaplin & Co., Limited* v. *Westminster Corporation*, [1901] 2 Ch. 329.

(*e*) See *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; and *Fritz* v. *Hobson*, 14 Ch. D. 542.

right resulting in damage, or (c) an infringement of a public right resulting in substantial and particular damage to some person beyond that suffered by the public. **Art. 1.**

Again, the act or omission must be unauthorised, *i.e.*, not justifiable by law. If a sheriff enters on a man's land under due process of law to execute a writ of *fi. fa.*, his act, though an infringement of the right of property, is not tortious, because it is authorised by the judgment and writ of execution. So, too, an entry on land may be justified by necessity, or by its being done lawfully in the exercise of a right of way or by licence of the owner of the land. And trespasses to the person by beating or imprisonment may be justified by a sentence of a court of competent jurisdiction, and an assault may be justified by its being done in self defence, or as reasonable chastisement by a parent or schoolmaster. In all these cases the acts done are primâ facie tortious, but are not actionable because they are authorised by law. The act or omission must be unauthorised

ART. 2.—*Ubi jus ibi remedium.*

A violation of every legal right (not being a breach of contract) committed knowingly and without lawful justification is a tort.

In the words of PRATT, C.J., "torts are infinitely various, for there is not anything in nature that may not be converted into an instrument of mischief" (*f*). Explanation.

An action for tort is the appropriate remedy for every infringement of right which is not a breach of contract: and as rights are infinitely various, so are torts.

The rights, infringements of which constitute torts, include— Classification of rights.

(1) *Personal rights*, such as the right everyone has to have his person immune from damage. Infringements of this right give rise to actions for trespass to the person

(*f*) See *Chapman* v. *Pickersgill*, 2 Wils. 146.

Art. 2. (assault and false imprisonment), and when the character or reputation is attacked to actions for libel and slander. An action for negligence also lies for personal injuries caused by the negligence of another.

(2) *Rights of property.*—These include rights in respect of corporeal and of incorporeal property. Infringements of these rights give rise to actions for trespass to land and goods, nuisance, conversion and detention of goods, infringements of trade marks and patent rights, interference with easements and franchises, trade obstruction, fraud, etc.

ART. 3.—*Of Volition and Intention in relation to the unauthorised Act or Omission.*

(1) The unauthorised act or omission must be attributable to active or passive volition on the part of the party to be charged, otherwise it will not constitute an element of a tort (*g*).

(2) Nevertheless a want of appreciation of its probable consequences affords no excuse; for every person is presumed to intend the probable consequence of his acts.

(3) *Want of knowledge that the unauthorised act or omission is an infringement of right, as a rule affords no excuse.*

The student must carefully distinguish between the voluntary nature of the act or omission and the want of appreciation of its consequences. It would be obviously unjust to charge a man with damage caused by some inevitable accident, over which, or over the causes of which, he had no control. On the other hand, it would be highly dangerous to admit the doctrine, that a man who does an act, or makes an omission voluntarily, should be excused

(*g*) See *Wear Commissioners* v. *Adamson*, 1 Q. B. D. 546 [C. A.], and *S. C.*, in H. L., 2 App. Cas. 743.

the consequences by reason of lack of judgment or of ignorance. So if a man consumes the goods of another, thinking they are his own, or trespasses on another's land, erroneously believing that there is a right of way, he is liable for the wrongful act he has done, and it is no excuse that he believed he had a right to do the act complained of. Art. 3.

The following illustrations will, however, help to accentuate the difference better than pages of explanation: Illustrations.

(1) A newspaper published a defamatory article of a person described as "Artemus Jones." Neither the author of the article nor the editor knew that there was in existence a person of the name of Artemus Jones, and therefore they could not have intended to defame any particular person. In fact there was a barrister of that name to whom readers of the article might reasonably think the article referred. As the article was in fact defamatory of him, the publishers were liable, the injury to the plaintiff being the natural consequences of their publishing the article (*h*).

So, too, if a person makes a false defamatory statement of another, it is no defence that he believed it to be true (*i*).

(2) A person has an unguarded shaft or pit on his premises. If another, lawfully coming on to the premises on business, falls down the shaft, and is injured, he may bring his action, although there was no intention to cause him or anyone else any hurt. For the neglect to fence the shaft was an unauthorised omission, and the fall of the plaintiff was the probable consequence of it (*k*).

(3) On the other hand, where a horse drawing a brougham under the care of the defendant's coachman in a public street, suddenly and without any explainable cause bolted, and notwithstanding the utmost efforts of the driver to control him, swerved on to the footway and knocked down the plaintiff, it was held that the defendant

(*h*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.
(*i*) *Ibid.*
(*k*) *Indermaur v. Dames*, L. R. 2 C. P. 311; *White* v. *France*, 2 C. P. D. 308.

Art. 3.

was not liable, as the accident was not attributable to any wrongful act or omission of the defendant or his servant (*l*).

(4) So, too, where a man accidentally shot another without intending to do so, and without being guilty of any negligence or want of care in the use of his gun, it was held that no action would lie. He had not been guilty of any imprudent act or omitted any precaution which a reasonable and prudent man would have taken (*m*).

ART. 4.—*Malice and Moral Guilt.*

Except in the case of an action for malicious prosecution, evil motive is not an essential ingredient in tort.

An evil motive cannot make wrongful an act that would otherwise not be so (*n*).

A good motive cannot justify an act that would otherwise be wrongful.

Malice.

"Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a **wrongful act done intentionally without just cause or excuse**" (*o*).

It is true to say of some acts that they are not tortious unless done maliciously, provided that the term "maliciously" is used in its strict legal sense. But malice in its popular sense has very little to do with the law of torts, and no action can ever be brought for a **lawful act** although done out of malice.

Thus, if A. intentionally and without just cause or excuse induce B. to break his contract of service with C., and damage results to C., A. commits a tort and

(*l*) *Manzoni* v. *Douglas*, 6 Q. B. D. 145.

(*m*) *Stanley* v. *Powell*, [1891] 1 Q. B. 86.

(*n*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587; *Allen* v. *Flood*, [1898] A. C. 1.

(*o*) *Per* BAYLEY, J., in *Bromage* v. *Prosser*, 4 B. & C. 247, at p. 255.

Art. 4.

may be sued by C.; and it is immaterial whether A. is influenced by good or bad motives (*p*). He may honestly think he is acting in the best interests of B. and C. His motive is then good; there is no "malice" in the sense of ill-will; but the act is malicious in the legal sense.

But if A. by lawful means induces B. not to enter into a contract of service with C., A. commits no wrong, and C. has no cause of action however much damage he may suffer, and although A. may be acting from the most wicked and selfish motives; for A.'s evil motive does not make wrongful his act which, apart from motive, is not a tort (*q*).

So, too, a man has a right to pump underground water from the subsoil under his own land. And this act being itself lawful is not actionable when done spitefully for the purpose of injuring his neighbour (*r*).

Malicious prosecution and libel.

The one kind of action in which evil motive is a necessary ingredient is malicious prosecution, and there is an apparent exception in the case of libel and slander. As to these, see *post*, Arts. 57 and 63.

Negligence.

Even negligence involves no moral guilt. The state of mind of the defendant is immaterial. The only question is, What has he done or left undone? Has he acted as a reasonable and prudent man would do in the circumstances? Not, has he done what he thought was the best thing to do? The law pays no regard to the moral culpability of the defendant, but considers only whether his conduct has been reasonable and prudent as judged from the standpoint of the average man.

Fraud.

It is said, indeed, that in order to constitute fraud there must be some moral turpitude; and in a sense this is true. Actionable fraud consists in the making of an untrue statement with the intention of deceiving and with knowledge that it is untrue or absolutely recklessly without caring whether it is true or untrue. The man who does this is no

(*p*) *Quinn* v. *Leathem*, [1901] A. C. 495.
(*q*) *Allen* v. *Flood*, [1898] A. C. 1.
(*r*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587.

Art. 4.

doubt in most cases morally guilty; but it is conceivable that a man may, from the highest motives and honestly believing that he is doing right, make a statement which he knows to be untrue, intending that that statement should deceive. Nevertheless his conduct, though possibly morally justifiable, is inexcusable in law.

When, therefore, in the law of torts the phrase "malice" is used, it must be understood in its legal sense, *i.e.*, as meaning a wrongful act done intentionally without just cause or excuse. Only in connection with malicious prosecution has it a different meaning, and there, as will be seen hereafter, it does not necessarily mean ill-will against a person.

ART. 5.—*Of the connection of the Damage with the unauthorised Act or Omission.*

When the cause of action is for actual damage, the unauthorised act or omission must be shown to have been an **effective cause** of the damage, but not necessarily the immediate cause, that is to say, the damage must be such as would in the ordinary course of events flow from the unauthorised act or omission, as a natural and probable consequence.

Illustrations.

(1) The defendant, in breach of the Metropolitan Police Act, 1839, washed a van in a public street and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. If it had not been stopped, and the road had been in a proper state of repair, the water would have passed away without doing any

mischief to anyone. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. It was held that the defendant was not liable, as it was not the ordinary and probable consequence of the defendant's act that the water should have frozen over so large a portion of the street so as to occasion a dangerous nuisance (*s*).

(2) In another case the defendant wrongfully left a house-van and steam plough for the night on the grassy side of a highway. During the evening a mare which was being driven on the highway in a cart was frightened by the house-van and plough. The mare was a kicker, but the driver did not know she was. She shied, kicked, galloped away kicking, got her leg over the shaft and fell, and kicked the driver as he fell out of the cart. The driver was killed, and it was held that his death flowed directly from the unauthorised act of the defendant. The mare being a kicker, her running away and the accident to the driver was not an unnatural or improbable consequence of her being frightened (*t*).

(3) The plaintiff was riding a bicycle on a highway on the footpath of which was a fowl belonging to the defendant. The fowl was frightened by a dog and flew between the spokes of the bicycle wheel. Assuming it was a wrongful act to let the fowl be on the footpath, it was not a natural or probable result of its being there that it should fly between the spokes of the cyclist's wheel and upset him (*u*).

(4) Defendants' vessel, owing to the negligence of their servants, struck on a sandbank, and becoming from that cause unmanageable was driven by wind and tide upon a sea-wall belonging to the plaintiffs, which it damaged :— *Held*, that the negligence of the defendants' servants was the effective cause of the damage to the sea-wall ; for it put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the combined effect of wind and tide would at the moment take it, and this was towards the sea-wall (*v*).

(*s*) *Sharp* v. *Powell*, L. R. 7 C. P. 258.
(*t*) *Harris* v. *Mobbs*, 3 Ex. D. 268.
(*u*) *Hadwell* v. *Righton*, [1907] 2 K. B. 345.
(*v*) *Bailiffs of Romney Marsh* v. *Trinity House*, L. R. 5 Ex. 204.

Art. 5.

Explanation.

The above illustrations will show the application of the rule where there is a chain of causation between the wrongful act or omission and the damage consisting of natural causes, whether of inanimate nature or of the lower animals. But sometimes there intervenes between the wrongful act or omission and the damage some act or omission of a third person. In these cases the rule is the same, though its application may be more difficult. It may be thus expressed:

Intervening act of third person.

Where an act of a third person intervenes between the wrongful act or omission and the damage, the wrongful act or omission is the effective cause if what the third person does is what such a person would naturally be expected to do in the circumstances (allowing for the frailty of human nature), but not otherwise (*w*).

Illustrations.

This rule is well illustrated by cases in which carts have been left on a highway unattended:

(1) In one case a cart was so left and a child seven years old got upon the cart in play, another child led on the horse and the first child was thereby thrown out and hurt. The owner of the cart was held liable, as it was a natural thing for children in such circumstances to play with an unattended cart (*x*). And where a driver of a van left it in charge of a tail-boy who drove on and came into collision with the plaintiff's carriage, it was held that the driver's leaving the cart in charge of a boy was the effective cause of the damage; what else could be expected of a boy than that he should try to drive the van? (*y*).

(2) But when a railway van was left by a railway company safely on a siding, locked, braked and coupled to a train, and mischievous boys trespassed on the siding and uncoupled the van and set it running down a slope so that it crossed a level crossing and injured the plaintiff, it was held that the company were not liable, as they could not reasonably have anticipated what actually happened (*z*). And in another case a drunken cabdriver, who fell asleep inside his cab, was held not liable for damage caused by

(*w*) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240 [C. A.].
(*x*) *Lynch* v. *Nurdin*, 1 Q. B. 29.
(*y*) *Engelhart* v. *Farrant*, *supra*.
(*z*) *McDowall* v. *Great Western Rail. Co.*, [1903] 2 K. B. 331 [C. A.].

Art. 5.

another drunken cabdriver getting on to the box of his cab and driving away for his own pleasure. If the first drunken driver had thought about it at all he would not have thought of another drunken driver getting on his box and driving off (*a*).

(3) Where a gas company supplied a defective service pipe which leaked, and a gasfitter employed to test it went to look for the leak with a lighted candle, and an explosion resulted, it was held that the explosion was the direct consequence of the defendant's negligence in supplying a defective pipe (*b*).

(4) In the famous squib case the facts were that a person wrongfully threw a squib on to a stall at a fair the keeper of which, in self defence, threw it off again; it then alighted on another stall, was again thrown away, and finally exploding, blinded the plaintiff. The liability of the person who originally threw the squib was in question, and DE GREY, C.J., said: "It has been urged that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal (the persons who merely threw away the squib from their respective stalls) as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation" (*c*).

ART. 6.—*The Act or Omission must be unauthorised.*

(1) An act or omission which is primâ facie tortious is not actionable if it is done under some lawful excuse.

(2) Among lawful excuses are that the act or omission is:

(i) An Act of State;

(ii) A judicial act;

(*a*) *Mann* v. *Ward*, 8 T. L. R. 699 [C. A.].
(*b*) *Burrows* v. *March Gas and Coke Co.*, L. R. 7 Ex. 96.
(*c*) *Scott* v. *Shepherd*, 2 W. Bl. 892 [C. A.].

Art. 6.

(iii) An executive act;
(iv) An act or omission authorised by statute;
(v) An act or omission done by leave and licence.

Explanation. Besides these excuses there are others of a more special character, which are dealt with in connection with those torts in relation to which they generally arise.

The general excuses above enumerated are shortly explained in the following Articles. Some of them are more fully explained in later portions of this work.

ART. 7.—*Act of State.*

No action can be brought for damage resulting from an Act of State, whether the transaction constituting an Act of State between two independent states or between a state and an individual foreigner (*d*).

NOTE.—It is not easy to define an Act of State; but it may be laid down generally that Acts of State are of two kinds: (1) Those which are transactions between two independent states, such as wars, treaties, annexation of territory, and so forth. An individual who suffers from such transactions has no cause of action, whatever other remedy he may have. (2) Those which are transactions between a state (*i.e.*, the government of this or any other country) and an individual foreigner. Sir James Stephen says: (*e*) "I understand by an Act of State an act injurious to the person or to the property of some person **who is not at the time of that act a subject of her Majesty**; which act is done by any representative of her Majesty's authority, civil or military, and is either previously sanctioned, or subsequently ratified by her Majesty. Such acts are by no means very rare, and they may, and often do, involve

(*d*) Halsbury's Laws of England, Vol. I., pp. 14, 15.
(*e*) History of the Criminal Law, Vol. II., p. 61.

destruction of property and loss of life to a considerable extent." Though Acts of State of this kind are not confined to warlike operations, nevertheless warlike operations come within the rule. So a foreigner who has been wounded or whose property has been destroyed in war, has no cause of action in respect thereof. **Art. 7**

It must be remembered, however, that the doctrine as to Acts of State can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. "As between the sovereign and his subjects there can be no such thing as an Act of State." So if one British subject destroys the property of another by the express command of the King, that command is no defence in an action of tort, for "courts of law are established for the express purpose of limiting public authority in its conduct towards individuals." (*f*).

ART. 8.—*General Immunity of Judicial Officers.*

(1) No action lies against a judge of a *superior* court in respect of any act done by him in his judicial capacity, even though he act oppressively, maliciously, and corruptly (*g*).

(2) No action lies against a judge of an *inferior* court in respect of any act done by him *within his jurisdiction* (*h*).

(3) A judge of an inferior court is liable for anything he does in his judicial capacity **but without his jurisdiction if he knew or had the**

(*f*) *Ibid.*, p. 65.

(*g*) *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668 [C. A.].

(*h*) *Doswell* v. *Impey*, 1 B. & C. 163, 169; *Houlden* v. *Smith*, 14 Q. B. 841.

Art. 8. **means of knowing** facts which would show that he had not jurisdiction (*i*).

NOTE.—The Supreme Court of Judicature (including the Court of Appeal and all the divisions of the High Court of Justice) is a superior court, as also are Assize Courts.

Inferior courts include county courts, the mayor's court, quarter sessions, petty sessions, and the court of a revising barrister.

It will be observed that the protection given to judges is not merely for what they do **lawfully**, as when they sentence convicted criminals to imprisonment, but also in many cases to what they do **unlawfully**, as if a judge sentences an innocent person to imprisonment.

If it were not for the rule now under consideration a judge would be liable to an action for assault or false imprisonment if he ordered the arrest or sentenced to imprisonment an innocent person. So, too, judges cannot be sued for slander in respect of defamatory words uttered by them in their judicial capacity. The following illustrations are cases of assault or false imprisonment. Illustrations of the immunity of judges from actions for libel and slander will be found in Art. 56.

Illustrations. (1) Where the judge of the Supreme Court of Trinidad and Tobago caused the plaintiff to be imprisoned in default of finding bail, and the jury found that he had overstrained his judicial powers, and had acted in the administration of justice oppressively and maliciously, and to the prejudice of the plaintiff and the perversion of justice, the Court of Appeal held that, nevertheless, no action lay (*k*).

(2) Similarly if a judge of a superior court acting in his judicial capacity sentences or orders a person to be imprisoned, no action for assault or false imprisonment lies, however erroneous and corrupt the sentence or order may have been.

(*i*) *Calder* v. *Halket*, 3 Moo. P. C. 28.

(*k*) *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668 [C. A.].

Art. 8.

(3) It will be noticed that though a judge of a superior court is protected, provided the judge is acting in his judicial capacity, in the case of a judge of an inferior court (*l*) the protection only extends to acts done by him **within his jurisdiction.** But if he exceeds his jurisdiction, as by sentencing a prisoner for an offence over which he has no jurisdiction, or in a place where he has no jurisdiction, although he act in his judicial capacity, he is not protected, and may be sued for trespass.

The protection of the rule, however, extends to all cases in which **upon the facts before him** he would have jurisdiction. If on the facts as they are brought before him a judicial officer has jurisdiction, he is excused, even though when all the facts are known it is seen that he has none. But if he has before him facts from which he **knew or ought to have known** that he had no jurisdiction, he is not protected. If he assumes jurisdiction when in fact he has none by shutting his eyes to the facts, or by reason of his ignorance of the law, he is liable for any tort he commits in excess of his jurisdiction (*m*).

(4) So where a police magistrate fined a person for not causing his child to be vaccinated, and issued a distress warrant in default of payment, he was held liable as the summons itself showed he had no jurisdiction, the prosecution being more than six months after the offence (*n*).

Art. 9.—*General Immunity of Executive Officers.*

(1) An executive officer, such as a sheriff or gaoler or constable acting on a warrant valid on

(*l*) It is not quite clear that the full measure of protection extends to inferior courts not of record (such as justices of the peace), but see the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1, and *Pease* v. *Chaytor*, 3 B. & S. 620.

(*m*) *Houlden* v. *Smith*, 14 Q. B. 841; *Willis* v. *Maclachlan*, 1 Ex. D. 376. See *Haggard* v. *Pelicier Frères*, [1892] A. C. 61 [P. C.].

(*n*) *Polley* v. *Fordham*, 91 L. T. 525. The case is reported on another point, [1904] 2 K. B. 345. See *post*, p. 99.

Art. 9. the face of it and issued by a person **who has jurisdiction**, is absolutely protected for anything he does in pursuance of the warrant (*o*).

(2) But a warrant or order of a court which has **no jurisdiction** in the matter, is no protection (*p*), except in the case of constables, who are protected by statute for arresting under a warrant of a justice, notwithstanding any defect of jurisdiction (*q*).

NOTE.—Thus, when a governor of a prison, in obedience to a warrant of commitment which directed that the plaintiff should be imprisoned in a certain gaol for seven days, detained the prisoner from August 25th (the day following that of his arrest) until August 31st, it was held that, as he had acted in obedience to a warrant issued by a court which had jurisdiction, no action for false imprisonment lay against him, whether the sentence properly ran from the day of the arrest (August 24th), or from the day when he was lodged in prison (August 25th) (*r*).

So, too, a sheriff is absolutely protected if under a writ of *fi. fa.* he seizes the goods of the judgment debtor. But the writ is no protection to him if he seizes the goods of some other person, for the writ does not authorise him to do that.

ART. 10.—*Authorisation by Statute.*

(1) If the legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful and no action will lie for any damage resulting from doing it, if it be done *without negligence.*

(*o*) *Henderson* v. *Preston*, 21 Q. B. D. 362 [C. A.]; *Olliet* v. *Bessey*, T. Jones Rep. 214.

(*p*) *Clark* v. *Woods*, 2 Ex. 395; *Wingate* v. *Waite*, 6 M. & W. 739.

(*q*) See Art. 120.

(*r*) *Henderson* v. *Preston*, 21 Q. B. D. 362.

Art. 10.

(2) An action does lie for doing that which the legislature has authorised, *if it be done negligently* (*s*).

(3) If the legislature merely permits a thing to be done if it can be done without causing injury, an action lies if it is done in such a manner as to cause injury (*t*).

Explanation.

When the legislature expressly empowers a railway company to make a railway on a particular site and to run trains upon it, no action lies against the company for any nuisance caused by reason of the making of the railway on that site and the running of trains without negligence. Acts of Parliament giving such powers usually contain provisions for compensating persons who suffer by reason of their lands being taken or injuriously affected by the exercise of the statutory powers, but *no action lies*, for what the legislature has expressly authorised cannot be wrongful.

There is, however, an implied obligation not to be negligent in carrying out statutory powers and duties, and for breach of this obligation an action lies.

By many Acts of Parliament local authorities and other bodies are given general powers to execute works, such as making sewerage works for their district, erecting hospitals for infectious diseases, and the like. These things may obviously be nuisances if done or made in unsuitable places, but are not necessarily nuisances. Whether an Act is merely permissive, or is one which expressly authorises the doing of a thing, whether it be a nuisance or not, is a question of construction: but generally when the thing to be done **must necessarily** cause injury to someone, the Act will be construed as authorising the doing of it in any case: if the thing to be done **will not necessarily** cause injury, but will only do so if done in certain places or a certain way,

(*s*) *Per* Lord BLACKBURN: *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, 455; *Hammersmith Rail. Co.* v. *Brand*, L. R. 4 H. L. 171.

(*t*) *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193.

Art. 10. the Act will be construed as permissive only. "It cannot now be doubted," says Lord HALSBURY (*u*), "that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law."

Illustrations. (1) The running of the trains upon a railway constructed under statutory powers, caused noise, vibration, and smoke, which depreciated the value of the plaintiff's property. It was held that as the Act had authorised the running of the trains, and as the damage complained of was a necessary result, no action would lie at common law (*x*).

(2) The Metropolitan Asylum District Board were authorised to purchase lands and erect buildings to be used as hospitals. But the Act did not imperatively order these things to be done. The Board erected a small-pox hospital, which was, in point of fact, a nuisance to owners of neighbouring lands. On these facts it was held, that the Board could not set up the statute as a defence (*y*). The Act was construed as meaning that a small-pox hospital might be built and maintained **if it could be done without creating a nuisance,** whereas the Railway Acts are construed to authorise the construction of the railway, whether a nuisance is created or not.

(3) A railway company authorised by statute to use locomotives on their line, set fire to the plaintiff's plantation by sparks emitted from a locomotive. They had used every precaution at that time known to prevent sparks, and had been guilty of no negligence, so they were protected by their statutory authority from liability (*z*). If they had not

(*u*) *London and Brighton Rail. Co.* v. *Truman*, 11 App. Cas. 45, at p. 50.

(*x*) *Hammersmith, etc. Rail. Co.* v. *Brand*, L. R. 4 H. L. 171.

(*y*) *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193. As to the evidence necessary to sustain a *quia timet* action for an injunction to prohibit a proposed small-pox hospital, see *Att.-Gen.* v. *Manchester Corporation*, [1893] 2 Ch. 87.

(*z*) *Vaughan* v. *Taff Vale Rail. Co.*, 5 H. & N. 679.

had express powers to run locomotives they would have been liable at common law, even though there was no negligence in the use of the locomotive (*a*). But in a later case where sparks set fire to dry clippings negligently left by the railway company on an embankment, and the fire spread thence on to the plaintiff's land and set fire to his crops, it was held that the company was liable, by reason of negligence (*b*). Art. 10.

ART. 11.—*Volenti non fit injuria.*

A person who consents to damage being done cannot bring an action in respect thereof.

(1) The application of this rule to cases where there is express consent is simple. A man who gives another permission to trespass on his land, or to touch his person, cannot afterwards bring an action for such trespass. Thus "leave and licence" is always a good defence to any action for tort. But of course anything done in excess of the leave and licence may be the subject of an action; as, for instance, if I give a man permission to walk on my land, doing no damage, and he does damage.

(2) The rule, however, is more difficult to apply in cases where the person damaged has not definitely consented to the particular act or omission causing the damage, but has voluntarily accepted the risk of damage being done by some act or omission of another. It has been held that if a person trespasses on land in defiance of a warning that there is danger in so doing (in the particular case the danger was from spring guns), he cannot bring an action for damage resulting from that danger (*c*). And the rule has even been extended to apply to cases where a person has accepted the risk of dangers accompanying his employment —such as those arising from the dangerous condition of the Incurring risk.

(*a*) *Jones* v. *Festiniog Rail. Co.*, L. R. 3 Q. B. 733.
(*b*) *Smith* v. *London and South Western Rail. Co.*, L. R. 6 C. P. 14.
(*c*) *Ilott* v. *Wilkes*, 3 B. & A. 304. See also *Lygo* v. *Newbold*, 9 Ex. 302.

Art. 11.

place where he works (*d*). This application of the rule will be better appreciated later, and is fully dealt with in connection with the law of negligence (*e*).

(3) And a person is not disentitled to recover merely because he knows of the existence of danger and takes the risk of incurring it. The amount of the danger and the risks, and all the circumstances must be taken into account. So where the defendants made a trench in the only outlet from a mews and left only a narrow passage on which they heaped rubbish, and the defendant led his horse out of the mews over the rubbish, and it fell into the trench and was killed, it was held to be properly left to the jury whether or not the cabman had persisted contrary to express warning in running upon a great and obvious danger. And the jury having found for the plaintiff, he was entitled to judgment (*f*).

ART. 12.—*To what Extent Civil Remedy interfered with where the unauthorised Act or Omission constitutes a Felony.*

(1) Where any unauthorised act or omission is, or gives rise to consequences which make it, a **felony**, and it also violates a private right, or causes private and peculiar damage to an individual, the latter has a good cause of action.

(2) But (*semble*) the policy of the law will not allow the person injured to seek civil redress, if he has failed in his duty of bringing, or endeavouring to bring, the felon to justice.

(3) Where the offender has been brought to justice at the instance of some third person

(*d*) *Thomas* v. *Quartermaine*, 18 Q. B. D. 685.

(*e*) See *post*, Art. 88.

(*f*) *Clayards* v. *Dethick*, 12 Q. B. 439. See the observations of BRAMWELL, L.J., on this case in *Lax* v. *Darlington Corporation*, 5 Ex. D. 28, 35.

Art. 12.

injured by a similar offence, or where prosecution is impossible by reason of the death of the offender, or (?) by reason of his escape from the jurisdiction before a prosecution could by reasonable diligence have been commenced, the right of action is not suspended (*g*).

N.B.—Remember the rule does not apply—

1. *To misdemeanors.*

2. *Where there is no duty on the part of the plaintiff to prosecute*, as where he is not the person injured by the felony (*h*).

3. *Where the felony was not committed by the defendant*, but by some third person (*i*).

Death caused by felony.

It is expressly provided by Lord Campbell's Act (see *post*, Article 33), that actions for damages brought in respect of the death of any person under that Act, shall be maintainable "although the death shall have been caused under such circumstances as amount in law to felony."

Illustrations.

(1) Where, in an action for seduction of the plaintiff's daughter, a paragraph of the claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion; it was held, that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute (*j*).

(2) So, where A. has stolen goods, and B. has innocently bought them from A., the owner may bring an action of

(*g*) *Per* BAGGALLAY, L.J., in *Ex parte Ball, Re Shepherd*, 10 Ch. D. 667, at p. 673; and see *per* COCKBURN, C.J., in *Wells* v. *Abrahams*, L. R. 7 Q. B. 554, at p. 557.

(*h*) *Appleby* v. *Franklin*, 17 Q. B. D. 93.

(*i*) *White* v. *Spettigue*, 13 M. & W. 603.

(*j*) *Appleby* v. *Franklin*, 17 Q. B. D. 93; and see also *Osborn* v. *Gillett*, L. R. 8 Ex. 88.

Art. 12.

trover against B., although no steps have been taken to bring A. to justice, for B. is not guilty of felony (*k*).

How to enforce the rule.

It is extremely doubtful how the rule can be enforced (*l*). It is no ground for the judge to direct a nonsuit (*m*). It cannot be raised by a summons to strike out the statement of claim (*n*); nor by pleading the felony in the defence, because the effect of that would be to allow a party to set up his own criminality. But it has been suggested, that if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of the court might be invoked to stay the proceedings, which would involve an undue use, probably an abuse, of the process of the court (*o*). But there would be great difficulty in taking this course, and there is no precedent for it (*l*).

In Ireland, a Divisional Court has declined to stay of its own motion, without any application by the defendant, an action of assault on the ground that the assault amounted to a felony, and had not been prosecuted (*p*).

(*k*) *White* v. *Spettigue*, 13 M. & W. 603.

(*l*) See *per* BRAMWELL, L.J., in *Ex parte Ball*, *Re Shepherd*, 10 Ch. D. 667.

(*m*) *Wells* v. *Abrahams*, L. R. 7 Q. B., at p. 563.

(*n*) *Roope* v. *D'Avigdor*, 10 Q. B. D. 412; *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561.

(*o*) *Wells* v. *Abrahams*, *supra*.

(*p*) *A.* v. *B.*, 24 L. R. Ir. 234; *S. C. sub nom.*, *S.* v. *S.*, 16 Cox C. C. 566.

CHAPTER II.

BREACH OF STATUTORY DUTIES.

Art. 13.—*Breach of Duty created for Benefit of Individuals.*

(1) When a statute creates a new duty **for the benefit of an individual or a class**, and does not provide any special remedy, an action for damages lies for breach of the duty (*a*).

(2) If the statute provides a special remedy, the party injured cannot bring an action for damages (*b*), but he **may have an injunction** unless the statute expressly excludes that remedy (*c*).

Under many Acts of Parliament, local authorities and other public bodies have imposed on them duties for the benefit of the public generally, and a breach of the duty, though it may affect an individual specially, is liable to affect the public at large, or all the persons in a district. Such duties are those which are imposed on sanitary authorities to provide proper systems of sewers, and on gas and water companies to provide gas and water sufficient in quantity and quality. If an individual suffers by breach of these duties, he cannot generally resort to an action, but must proceed by *mandamus*, indictment, or such other remedy as may be available. Explanation.

(*a*) *Per* Willes, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 28 L. J. C. P. 242.

(*b*) *Ibid.*

(*c*) *Stevens* v. *Chown*, *Stevens* v. *Clark*, [1901] 1 Ch. 894.

Art. 13. It is different, however, where the duty is imposed for the benefit of an individual or a limited class of persons; in such cases a breach of the duty is a wrong to the individual or to each member of the class for whose benefit the duty is created, and a breach of that duty is a tort for which an action for damages will lie, unless the legislature has provided some other remedy, such as a penalty. If a special remedy is provided that impliedly excludes the remedy by action for damages. But it does not even impliedly exclude the remedy by injunction. Instead of taking the special remedy provided by the statute, the person injured may claim an injunction to restrain threatened breaches of the duty, unless that remedy is expressly excluded by the statute.

In every case, however, it is a question of construction of the statute by which the duty is created. A statute *may* give a remedy by action for breach of a public duty, or may create a private duty and yet say that there shall be no remedy for its breach.

Illustrations. (1) Under the British Columbia Crown Procedure Act, it is the duty of the provincial secretary to submit to the lieutenant-governor a Petition of Right left with him for that purpose. His definite refusal to do so gave the petitioner a cause of action for damages(*e*).

(2) If an employer is guilty of a breach of a provision in the Factory Acts, by which he is required to fence dangerous machinery, a workman who is injured in consequence thereof, has a cause of action against the employer for such breach (*f*).

ART. 14.—*Breach of Duty created for Benefit of Public.*

(1) When a statute creates a duty **for the benefit of the public**, no action lies at the suit of an individual for damages occasioned by mere neglect to perform that duty, unless the statute

(*e*) *Fulton* v. *Norton*, [1908] A. C. 451 [P. C.].
(*f*) *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402 [C. A.].

clearly shows the intention of the legislature that there should be such a remedy (*g*). Art. 14.

Illustration. A sanitary authority in London failed to perform the duty imposed upon them by s. 29 of the Public Health (London) Act, 1891, of removing street refuse (including snow) from the streets. The plaintiff suffered injuries by a fall caused by snow which the sanitary authority had neglected to remove. It was held that he had no cause of action (*h*).

Art. 15.—*Highway Authorities not Liable for Nonfeasance.*

A highway authority is not liable for damages resulting from mere nonfeasance, *i.e.*, for mere neglect to perform its statutory duty of repairing the highway: but is liable for damage resulting from misfeasance, *i.e.*, for doing something which creates a nuisance in the highway (*i*).

Explanation. Before the present highway authorities were created by Act of Parliament, the rule was established that a surveyor of highways was not liable for not repairing a highway, the proper remedy being indictment of the inhabitants (*k*). And many recent cases have shown that the same rule is applied to the statutory bodies to whom the duty of repairing highways has been transferred by statute, unless there is anything in the statute to show an intention to make them liable for nonfeasance (*l*). The rule applies also to bridges which are highways (*m*).

(*g*) *Atkinson* v. *Newcastle Waterworks Co.*, 2 Ex. D. 441 [C. A.]; *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64.

(*h*) *Saunders* v. *Holborn District Board of Works*, *supra*.

(*i*) *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345.

(*k*) *Russell* v. *Men of Devon*, 2 T. R. 667.

(*l*) *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524 [P. C.]; *Gibraltar Sanitary Commissioners* v. *Orfila*, 15 App. Cas. 400 [P. C.]; *Sydney Municipal Council* v. *Bourke*, [1895] A. C. 433.

(*m*) *Russell* v. *Men of Devon*, *supra*; *M'Kinnon* v. *Penson*, 8 Ex. 319.

Art. 15.

Misfeasance.

When a highway authority creates an artificial work in a highway, they will be liable if that work is a nuisance and causes damage to an individual, for the creation of a nuisance is misfeasance. And they may also be liable if by their negligence they allow it to get out of repair so as to become a nuisance, for that is not mere non-repair of the highway. They actively cause a nuisance **by putting the thing there,** if the thing gets out of repair so as to be a nuisance (*n*).

Highway and sanitary authority.

Sometimes the same local body is both highway authority and sanitary authority, and in their capacity of sanitary authority they may put in the highway a manhole or grating for sewers. If this thing gets out of repair by reason of their *negligence* (but not otherwise), they are liable (*o*). But if it becomes a nuisance by reason of the surface of the roadway getting worn down round it, whilst the thing itself is not out of repair, they are not liable. Not as highway authority, for their only breach of duty is not repairing: and not as sanitary authority, for the thing they have put there is not out of repair, and they have been guilty of no negligence (*p*).

Illustrations.

(1) A highway authority removed a fence which their predecessors had erected to protect the public from a dangerous ditch. A man driving along the road drove into the ditch, and was drowned. Removing the fence was misfeasance, and the highway authority was liable (*q*).

(2) An urban authority lawfully made a manhole in the street. The cover was properly made and in good order, but the surface of the road was allowed to wear down so that the cover projected above the surface. The plaintiff's horse stumbled over this, and was injured. The only breach of duty was not repairing the surface of the road, and this was nonfeasance, for which the council was not liable (*r*).

(*n*) *Borough of Bathurst* v. *Macpherson*, 4 App. Cas. 256 [P. C.]; *Lambert* v. *Lowestoft Corporation*, [1901] 1 K. B. 590.

(*o*) See *ante*, Art. 11.

(*p*) *Thompson* v. *Brighton Corporation*, *Oliver* v. *Horsham Local Board*, [1894] 1 Q. B. 332.

(*q*) *Whyler* v. *Bingham Rural District Council*, [1901] 1 Q. B. 45.

(*r*) *Thompson* v. *Brighton Corporation*, *supra*.

Art. 15.

(3) By the negligence of a person employed by the defendants, the highway authority of Canterbury, a heap of stones was left by the side of a road without a light. The plaintiff driving by in the dark, was upset by it and injured. The negligence consisted in putting the heap of stones by the roadside, and this was misfeasance for which the defendants were liable (*s*).

(*s*) *Foreman* v. *Canterbury Corporation*, L. R. 6 Q. B. 214.

CHAPTER III.

RELATION OF CONTRACT AND TORT.

ART. 16.—*Distinction between Actions for Tort and for Breach of Contract.*

(1) If the cause of complaint is for breach of a contractual duty (that is to say, is for an act or omission which would not give rise to any cause of action without proof of a contract), the action is one of contract.

(2) But if the relation of the plaintiff and the defendant be such that a duty arises from the relationship, irrespective of contract, for a breach of that duty the remedy is an action of tort (*a*).

Comment.

Formerly a plaintiff had to be careful to frame his action either in tort or in contract, and the rule then was that if the act or omission complained of was both a breach of duty arising apart from contract, and a breach of contract, the plaintiff might sue in contract or tort (*b*). But now the courts do not regard the form of pleading so much as the real nature of the action. The distinction between tort and contract is chiefly of importance upon the question of the amount of costs recoverable (*c*). The rule is that where the wrong is in substance tort, the plaintiff cannot merely

(*a*) See *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944 [C. A.], *per* A. L. SMITH, L.J., at p. 947.

(*b*) *Brown* v. *Boorman*, 11 Cl. & F. 1.

(*c*) See County Courts Act, 1888, s. 116, and County Courts Act, 1903, s. 3.

Art. 16. by suing in contract entitle himself to a larger measure of damages (*d*).

Illustrations. (1) A railway company owes to a passenger, irrespective of any contract, a duty to take care. The taking of a ticket also constitutes a contract to carry. If the servants of the railway company are negligent, whether by acts of omission or by acts of commission, the cause of action is in substance a tort, being a breach of a duty arising irrespective of contract, although in form the action might be framed as a breach of contract (*e*).

(2) A person who takes in a horse under a contract of agistment, impliedly undertakes not to be negligent in respect of the horse. But as he is a bailee for reward, the same duty to take care arises irrespective of the contract, and an action for not taking care is in substance an action of tort for negligence (*f*). So in all cases of actions between bailor and bailee, if the duty arises out of the bailment at common law, a breach of that duty gives rise to an action for tort; but if the duty only arises out of a contract between the parties, and would not apart from such contract arise from the mere relationship of bailor and bailee, a breach of the duty is properly the subject of an action for breach of contract (*g*).

ART. 17.—*Privity not necessary where the Remedy is in Tort.*

When something done in pursuance of a contract between two persons gives rise to a relationship between one of them and a third person, such that the one owes a duty to the third person, irrespective of the contract, the

(*d*) *Chinery* v. *Viall*, 5 H. & N. 295.

(*e*) *Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134 [C. A.]; *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944 [C. A.].

(*f*) *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56 [C. A.].

(*g*) *Ibid.*, at p. 59, *per* COLLINS, L.J.

Art 17.

third person cannot sue on the contract because he is not privy to it, but he can sue in tort for breach of the duty arising, irrespective of the contract.

Illustrations.

(1) A man employs a surgeon to attend his wife or his infant son. By reason of the surgeon's negligence, the patient is injured. There is a contract between the man who calls in the surgeon and the surgeon, but none between the surgeon and the patient. But irrespective of the contract, the surgeon owes a duty to take care by reason of the relationship of surgeon and patient. And for breach of this duty the patient can sue in tort (*h*).

(2) A passenger by train lost his luggage by reason of the negligence of the company's servants. The passenger's fare had been paid by his master. There was accordingly no contract between the passenger and the railway company—nevertheless the company were as bailees bound to take care of the passenger's luggage, and for breach of that duty the passenger could sue in tort (*i*).

(3) Again, where the defendant sold to A. a hair-wash, *to be used* by *A.'s wife*, and professed that it was harmless, but in reality it was very deleterious, and injured A.'s wife, it was held that she had a good cause of action against the defendant, for the hairdresser owed A.'s wife a duty, irrespective of contract, not to send out for her use a dangerous hair-wash (*k*).

(4) But when no duty, irrespective of contract, can be shown, a person who is injured by another's negligence in carrying out a contract has no cause of action. Thus, in *Le Lievre* v. *Gould* (*l*), mortgagees lent money by instalments to a builder, on the faith of certificates negligently granted by the defendant, who was a surveyor appointed,

(*h*) *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; *Pippin* v. *Sheppard*, 11 Price. 400.

(*i*) *Marshall* v. *York, Newcastle and Berwick Rail. Co.*, 11 C. B. 655, and see *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387 [C. A.].

(*k*) *George* v. *Skivington*, L. R. 5 Ex. 1.

(*l*) [1893] 1 Q. B. 491 [C. A.].

Art. 17.

not by the mortgagees, but by the builder's vendor. The certificates were inaccurate, and the mortgagees thereby suffered loss, for which they claimed compensation from the defendant:—*Held*, that as there was no contractual relation between them, the defendant owed no duty to the plaintiffs, and the action could not be maintained. It was urged that a certificate carelessly issued was as dangerous as an ill-made gun or a poisonous hair-wash, and that on that ground the defendant was liable; but the court would not admit the analogy. Of course, however, if the certificate had been *fraudulent*, *i.e.*, issued with intent to deceive the plaintiff, then, independently of any contractual relation, the defendant would have been liable in an action of deceit.

(5) So, too, when A. built a coach for the Postmaster-General, B. horsed it and hired C. to drive it, the coach broke down from a defect in its construction, and C. was consequently injured, it was held that A. **owed no duty to C. apart from contract**, therefore C. could not sue A. in tort. Nor, of course, could C. have sued A. in contract, as C. was no party to the contract between A. and B., and A. was no party to the contract between B. and C. (*m*).

ART. 18.—*Duties gratuitously undertaken.*

When a person gratuitously undertakes to perform any service for another, then although no action will lie for not performing the service (there being no consideration for the promise) yet an action will lie for negligence in the performance of it (*n*).

A duty to take care may arise apart from any contract whatever, and for breach of that duty the remedy is an action of tort.

(*m*) *Winterbottom* v. *Wright*, 10 M. & W. 109, followed in *Earl* v. *Lubbock*, [1905] 1 K. B. 253 [C. A.].

(*n*) *Coggs* v. *Bernard*, 1 Sm. L. C. 177.

Art. 18.
Illustrations.

(1) Thus, in *Coggs* v. *Bernard*, the defendant gratuitously promised the plaintiff to remove several hogsheads of brandy from one cellar to another, and, in doing so, one of the casks got staved through his gross negligence. Upon these facts it was decided that the defendant was liable; for although his contract could not have been enforced against him, yet, having once entered upon the performance of it, he thence became liable for all misfeasance.

(2) In *Doorman* v. *Jenkins* (*o*), a keeper of a coffee house gratuitously undertook the custody of money for a customer. It was lost whilst in his care by his negligence. He was held liable in an action for breach of the duty to take care arising from his becoming bailee of the money.

(3) Where the plaintiff was invited by the defendants' servant to ride on an engine, and he did so for his own convenience, and was injured by the negligence of the defendants' servants, the defendants were held liable; as by gratuitously undertaking to carry the plaintiff, the defendants came under a duty to exercise care, and they were liable in an action of tort for breach of that duty (*p*).

(*o*) 2 A. & E. 256.
(*p*) *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219 [C. A.].

CHAPTER IV.

VARIATION IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORISED ACT OR OMISSION TAKES PLACE OUTSIDE THE JURISDICTION OF OUR COURTS.

Art. 19.—*Torts committed Abroad.*

An action will lie in the English Courts for a tort committed outside England, provided:

(a) It is actionable according to English law and not justifiable according to the law of the country where it was committed (*a*); and

(b) It is a tort which is not of a purely local nature, such as a trespass to, or ouster from, land, or a nuisance affecting hereditaments.

Note, that in order to comply with paragraph (a) it is not necessary that the tort should be **actionable** according to the law of the country where the act was committed, provided that it is **not justifiable** by that law; that is to say, that it is an act in respect of which civil **or criminal** proceedings may be taken in that country.

Illustrations.

(1) Thus, in the leading case of *Mostyn* v. *Fabrigas* (*b*), it was held that an action lay in England against the governor of Minorca for a false imprisonment committed by him in Minorca, the plaintiff being a native Minorquin.

(2) Some ammunition, which was British goods, was seized on board a British ship by an officer of the British

(*a*) *Machado* v. *Fontes*, [1897] 2 Q. B. 231 [C. A.]; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176.

(*b*) 1 Sm. L. C. 591.

Art. 19.

Navy in territorial waters of Muscat. The seizure was justifiable in Muscat under a proclamation of the Sultan of Muscat. It was held that no action lay for the seizure (*c*).

(3) So an action will lie in this country for a libel contained in a pamphlet in the Portuguese language and published in Brazil, even though libel be not actionable in Brazil, provided it be not justifiable in Brazil, *i.e.*, it is enough if it be punishable in Brazil (*d*).

(4) The English courts have no jurisdiction to entertain an action to recover damages for trespass to land situate abroad; injuries to proprietary rights in foreign real estate being outside their jurisdiction. So the courts have recently refused to try a case of trespass to lands in South Africa (*e*).

(*c*) *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176.

(*d*) *Machado* v. *Fontes*, [1897] 2 Q. B. 231 [C. A.].

(*e*) See *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602, where the earlier cases are examined.

CHAPTER V.

OF PERSONAL DISABILITY TO SUE AND TO BE SUED FOR TORT.

ART. 20.—*Who may sue.*

(1) Every person may maintain an action for tort, except an alien enemy, or British subject adhering to the King's enemies (*a*), and a convict (sentenced to death or penal servitude) during his incarceration (*b*).

(2) A married woman may sue alone, and any damages recovered are her separate property (*c*).

(3) A husband cannot sue his wife in tort (*d*).

(4) A wife can sue her husband in tort "for the protection and security of her own separate property"; but cannot sue him otherwise in tort (*d*).

(5) A corporation cannot sue for a tort merely affecting its reputation, such as a libel charging the corporation with corrupt practices (*e*).

NOTE.—At common law husband and wife could not sue each other at all, nor could a married woman sue anyone without joining her husband as plaintiff. Now a married

(*a*) See *De Wahl* v. *Braune*, 1 H. & N. 178; *Netherlands South African Rail. Co.* v. *Fisher*, 18 T. L. R. 116.

(*b*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 8, 30.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1; *Beasley* v. *Roney*, [1891] 1 Q. B. 509.

(*d*) *Phillips* v. *Barnet*, 1 Q. B. D. 436; and 45 & 46 Vict. c. 75, s. 12.

(*e*) *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94.

Art. 20. woman can sue alone anyone but her husband. She can also sue her husband for the protection and security of her separate property; but no corresponding right is given to him. If a husband claims possession of property from his wife he must proceed by originating summons to have the question determined in a summary manner by a judge (*f*).

Unborn child.

It is doubtful whether an action can be brought for injuries suffered by the plaintiff whilst he was still *en ventre sa mère*. It has been held in Ireland that an action for negligence would not lie in such circumstances (*g*); but it has been held in England that where a man was killed by negligence his child, unborn at the time of the accident, might claim damages under Lord Campbell's Act (*h*).

ART. 21.—*Who may be sued for a Tort.*

(1) Every individual who commits a tort is liable to be sued, notwithstanding infancy, coverture, or unsoundness of mind; except (i) the sovereign, (ii) foreign sovereigns, and (iii) ambassadors of foreign powers (*i*). But foreign sovereigns and ambassadors can waive their privilege (*k*).

(2) A corporation which commits a tort is as liable to be sued as a private individual would be, if the thing done or omitted is within the purpose for which the corporation exists; but otherwise the corporation is not liable, and its directors, servants, or other persons who authorise or commit the tort can alone be sued (*l*).

(*f*) Married Women's Property Act, 1882, ss. 12, 17.
(*g*) *Walker* v. *Great Northern Rail. Co.*, 28 L. R. Ir. 69.
(*h*) *The George and Richard*, L. R. 3 Ad. & E. 466.
(*i*) See *Magdalena Co.* v. *Martin*, 28 L. J. Q. B. 310.
(*k*) *Duke of Brunswick* v. *King of Hanover*, 6 Bea. 1.
(*l*) *Mersey Docks* v. *Gibbs*, L. R. 1 H. L. 93.

(3) No action for tort can be brought against a trade union. Art. 21.

Illustrations. Infants.

(1) Thus, if an infant hires a horse he is liable in an action of negligence for immoderately riding the horse, for, as bailee, he is bound to take care of the horse, and the breach of that duty is a tort (*m*). But he would not be liable in an action of *contract* founded on the hiring (*n*).

(2) An infant, however, cannot be sued in tort if such an action would be only an indirect way of enforcing a contract on which he is not liable. So if goods (not being necessaries) are delivered to him under a contract of sale and he does not pay for them, he cannot be sued for converting them to his own use, for that would be only another way of recovering the price (*o*). Nor, if an infant induces another to contract with him by representing that he is of age, can he be sued in an action for deceit, for that would be only another way of recovering damages for breach of the contract (*p*).

Lunatics

(3) There is not much authority upon the liability of *lunatics* for their torts. KELLY, C.B., says lunacy is no defence in an action for a wrong, as libel or assault (*q*). But ESHER, M.R., suggests that his liability in libel depends on "whether he is sane enough to know what he is doing" (*r*). Lord KENYON points out in *Haycroft* v. *Creasy* (*s*), the distinction between answering *civiliter et criminaliter* for acts injurious to others. "In the latter case the maxim applied *actus non facit reum nisi mens sit rea*, but it was otherwise in civil actions where the intent was immaterial if the act done were injurious to another." And no doubt a lunatic is generally liable in tort (*t*).

(*m*) *Burnard* v. *Haggis*, 14 C. B. (N.S.) 45, followed in *Walley* v. *Holt*, 35 L. T. 631.

(*n*) *Jennings* v. *Rundall*, 8 Term Rep. 335.

(*o*) *Per cur.* in *Manby* v. *Scott*, 1 Sid. 129 [Ex. Ch.].

(*p*) See *Johnson* v. *Pie*, 1 Keble, 905, 913; *Bartlett* v. *Wells*, 1 B. & S. 826.

(*q*) *Mordaunt* v. *Mordaunt*, L. R. 2 P. & D. 102, 142.

(*r*) *Emmens* v. *Pottle*, 16 Q. B. D. 354, 356 [C. A.].

(*s*) 2 East, 92, at p. 104.

(*t*) See also *per* ESHER, M.R., in *Hanbury* v. *Hanbury*, 8 T. L. R. 559 [C. A.], at p. 560.

Art. 21.

Colonial governors.

(4) A governor of a colony is not a sovereign. He may be sued for tort in the courts of his own colony or in this country (*u*).

Corporations.

(5) With regard to corporations, of course actions of tort can of necessity only arise for acts or omissions of their directors or servants, and the difficulty in such cases is the same as arises in other cases of the responsibility of a principal for the acts of his agent, viz., the difficulty of determining whether or not the act or omission complained of was within the scope of the general authority or duty of such servant or director (*x*).

It was long doubtful whether a corporation aggregate could be sued in an action of malicious prosecution. It was thought that a corporation, having no mind, could not act maliciously (*y*). But it is now settled that a corporation may be made liable for malicious prosecution if in instituting the proceedings it is actuated by motives which in an individual would be malice (*z*).

And on the same principle, a corporation may be liable for publishing a libel on a privileged occasion. Though a corporation cannot itself be guilty of actual malice, it is liable if its agent in publishing the libel is actuated by malice (*a*)

Trade unions.

(6) Trade unions registered under the Trade Union Acts, 1871 and 1876, are associations of masters or of workmen empowered to hold property, and with limited powers of suing and being sued in contract.

It was held in the famous Taff Vale Case (*b*), that there was nothing in these Acts to prevent an action for tort being brought against a trade union, and after that decision

(*u*) *Fabrigas* v. *Mostyn*, 1 Cowp. 161; *Phillips* v. *Eyre*, L. R. 6 Q. B. 1; *Musgrave* v. *Pulido*, 5 App. Cas. 102.

(*x*) See Chapter VI.

(*y*) See Lord BRAMWELL'S opinion in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.

(*z*) *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392, following *Edwards* v. *Midland Rail. Co.*, 6 Q. B. D. 287.

(*a*) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423.

(*b*) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* [1901] A. C. 426.

many such actions were brought until the Trade Disputes Act, 1906 (*c*), was passed. That Act provides (*inter alia*) that an action shall not be entertained by any court (a) against a trade union, or (b) against any members or officials of a trade union (on behalf of themselves and all other members of the union) in respect of any tortious act alleged to have been committed by or on behalf of the union. This gives trade unions complete immunity from actions of tort. Art. 21.

ART. 22.—*Joint Tort-feasors.*

(1) Persons who jointly commit a tort may be sued jointly or severally; and if jointly, the damages may be levied from both or either (*d*).

(2) A judgment against one of several joint tort-feasors is a bar to an action against the others, even although the judgment remains unsatisfied (*e*).

(3) A release of one of several joint tort-feasors is a bar to an action against the others (*f*); but a mere covenant not to sue one of them is not (*g*).

(4) If damages are levied upon one only, then (a) where the tort consists of an act or omission, the illegality of which he must be presumed to have known, he will have no right to call upon the others to contribute (*h*). But (b) where the tort consists of an act not obviously unlawful in itself (*e.g.*, trover by a person from whom the same goods are claimed by adverse

(*c*) 6 Edw. 7, c. 47.

(*d*) *Hume* v. *Oldacre*, 1 Stark. 351; *Blair and Sumner* v. *Deakin, Eden and Thwaites* v. *Deakin*, 57 L. T. 522.

(*e*) *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547 [Ex. Ch.].

(*f*) *Cocke* v. *Jennor*, Hob. 66.

(*g*) *Duck* v. *Mayeu*, [1892] 2 Q. B. 511 [C. A.].

(*h*) *Merryweather* v. *Nixan*, 8 Term Rep. 186.

Art. 22.

claimants), he may claim contribution or indemnity against the party really responsible for the tort; and this right is not confined to cases where he is the agent or servant of the other tort-feasor (*i*).

NOTE.—When two or more persons join in committing a tort, each is responsible for the whole of the injury sustained by their common act. To constitute two persons joint tort-feasors, they must act together in furtherance of a common design, or one must aid, counsel or direct the other. If two persons acting quite independently contribute by their separate acts to the same damage, they are not joint tort-feasors. So, too, persons independently repeating the same slander, or independently making a noise or obstruction which is a nuisance, are not joint tort-feasors (*k*).

One cause of action.

Against two or more joint tort-feasors there is only **one cause of action,** and if that cause of action is **released** or **merged in a judgment,** no second action can be brought. So where A. and B. jointly converted C.'s piano to their own use, and judgment was recovered in an action against A. only, no further action could be brought against B., although the judgment against A. was unsatisfied. A. or B. might have been sued jointly in the first action, and then C. might have enforced the judgment against either of them (*l*).

Partners.

When a partner in a firm acting in the ordinary course of the business of the firm, or with the authority of his co-partners, commits a tort in regard to any third person, all the partners are jointly liable. Each member of the firm is also severally liable (*m*).

(*i*) *Adamson* v. *Jarvis*, 4 Bing. 66, 72; *Betts* v. *Gibbins*, 2 A. & E. 57.
(*k*) See *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450.
(*l*) *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547 [Ex. Ch.].
(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 10, 12.

CHAPTER VI.

LIABILITY FOR TORTS COMMITTED BY OTHERS.

SECTION I.—LIABILITY OF HUSBAND FOR TORTS OF WIFE.

ART. 23.—*Wife's ante-nuptial and post-nuptial Torts.*

(1) A married woman may be sued alone in respect of her *ante-nuptial* torts. Her husband is also liable to the extent of the property which he received with her; and he may be sued either jointly with her or alone (*a*).

(2) A married woman may also be sued alone in respect of her *post-nuptial* torts (*b*), but her husband is also liable, and may be joined with her as defendant (*c*).

(3) The liability of a husband for his wife's torts comes to an end by the death of the wife, or by divorce or judicial separation.

Before the Married Women's Property Act, 1882, a wife could not be sued alone for a tort. Her husband was necessarily joined as defendant in an action of tort brought against her, as all her property vested in him during coverture, and there was therefore no means of satisfying a judgment obtained against her alone. Since the passing

(*a*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 13—15.

(*b*) *Ibid.*, s. 1.

(*c*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; *Earle* v. *Kingscote*, [1900] 1 Ch. 203.

Art. 23.

of the Married Women's Property Act, a married woman is capable of holding separate property, and judgment may be had against her to the extent of her separate property, and to that extent the Act provides that she is liable for, and may be sued alone for, her torts as if she were a *feme sole*. This enactment, however, does not affect the common law liability of a husband for his wife's torts (*d*); and, consequently, a plaintiff can elect whether he will sue the wife alone, or join her husband as co-defendant with her. The present state of the law is clearly defined by the judgment of the Court of Appeal in *Beck* v. *Pierce* (*e*).

Death or divorce.

If the wife dies or the marriage is dissolved (*f*), from that moment the husband's liability ceases, even for torts committed during coverture, and even though an action is pending. Unless judgment has been actually given, his liability is at an end from the moment of her death or the decree absolute.

Separation.

The same rule applies where the parties are judicially separated (*g*). The decree puts an end from the moment when it is pronounced to the husband's liability. But where the parties are living apart under a voluntary separation, a husband's liability for his wife's torts continues (*h*).

SECTION II.—LIABILITY OF PARTNERS FOR EACH OTHER'S TORTS.

The foundation of the liability of partners for each other's torts is that each partner is the agent of his copartners in relation to the conduct of the partnership business. The law has now been codified by ss. 10 and 11 of the Partnership Act, 1890:

(*d*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177.
(*e*) 23 Q. B. D. 316.
(*f*) *Capel* v. *Powell*, 17 C. B. (N.S.) 743.
(*g*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26; *Cuenod* v. *Leslie*, [1909] 1 K. B. 880 [C. A.].
(*h*) *Head* v. *Briscoe*, 5 C. & P. 484.

ART. 24.—*Statutory Rule.* Art. 24.

(1) Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm, the firm is liable therefor to the same extent as the partner so acting or omitting to act. Partnership Act, 1890, s. 10.

(2) When the firm is liable, the individual partners are jointly and severally liable. Section 12.

In order to render a firm liable, the tort must be a wrongful act or omission of a partner committed or made either (1) with the authority of his copartners, or (2) in the ordinary course of the firm's business. If, therefore, it be committed or made without the actual authority of the copartners, and outside the scope of the partner's ostensible authority, the firm will not be liable any more than it would be for a contract entered into under similar circumstances.

(1) Thus a firm of solicitors would be liable for the professional negligence and unskilfulness of one of the partners (*i*). Similarly, a firm of newspaper proprietors would be liable for a libel inserted by an editor partner. So, a firm of company promoters would be liable for a fraudulent prospectus issued in the course of business by an individual partner. In all these cases the inquiry is simply whether the wrongful act or omission was done or made in the course of the partner's duty as such, or outside it. Illustrations. Negligence. Libel.

(2) There is one tort from which the firm is specially exempted from liability by the Statute of Frauds Amendment Act, 1828 (*k*), by which it is enacted that the firm is not to be liable for false and fraudulent representation as to the character or solvency of any person, unless the repre- Fraudulent guarantees.

(*i*) *Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith and Blyth*, [1891] 1 Ch. 337.
(*k*) 9 Geo. 4, c. 14, s. 6.

Art. 24. sentation is in writing **signed by all the partners**. The signature of the firm's name is insufficient even although all the partners are privy to the misrepresentation (*l*).

SECTION III.—LIABILITY FOR TORTS OF AGENTS AUTHORISED EXPRESSLY OR BY RATIFICATION.

ART. 25.—*Qui facit per alium facit per se.*

A person who expressly authorises another to commit a tort is liable as fully as if he had himself committed the tort. And the agent is also liable. In tort a person cannot excuse himself by saying that he was acting as the agent of another. Agent and principal are equally liable.

NOTE.—A principal is not, however, necessarily answerable for every tort of his agent. If the agent is employed to commit a tort the principal is clearly liable. If the agent is employed to do a thing not in itself wrongful, and in the course of doing the thing for which he is employed he commits a tort, the extent of the principal's liability depends, as we shall see hereafter, partly on whether the agent is a servant or an independent contractor.

ART. 26.—*Ratification of Tort committed by an Agent.*

A tortious act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, and,

(*l*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301 [Ex. Ch.].

whether it be for his detriment or his advantage, to the same extent as if the same act had been done by his previous authority (*m*). Art. 26.

This rule is generally expressed by the maxim, "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*," and is equally applicable to torts and to contracts.

To constitute a binding ratification of acts done without previous authority (1) the acts must have been done for and in the name of the supposed principal, and (2) full knowledge of them, and unequivocal adoption, must be proved; or else the circumstances must warrant the clear inference that the principal was adopting the acts of his supposed agent, whatever their nature or culpability (*n*).

Illustration. The plaintiff's goods were illegally seized under a warrant of distress handed to a bailiff by the defendants. The plaintiff wrote to the defendants seeking reparation. The defendants replied that their solicitors would accept process of service. The defendants had given no special instructions to the brokers. It was held in the Court of Appeal that there was ample evidence of ratification by the defendants, and that they were liable for the wrongful seizure made by the bailiff on their behalf (*o*).

SECTION IV.—LIABILITY FOR TORTS OF SERVANTS.

ART. 27.—*Respondeat Superior.*

(1) A servant is a person employed by another, and subject to the commands of that other as to the way he shall do his work.

(*m*) *Wilson* v. *Tumman*, 6 Man. & Gr. 236, 242.

(*n*) *Marsh* v. *Joseph*, [1897] 1 Ch. 213 [C. A.]; *Wilson* v. *Tumman*, *supra*; and *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240.

(*o*) *Carter* v. *St. Mary Abbott's, Kensington Vestry*, 64 J. P. 548 [C. A.].

Art. 27.

(2) A person who is in the general employment of one man may be the servant of another for a particular purpose, that other having control of him as to the manner in which he carries out his duties in connection with that particular purpose.

(3) A master is liable for the negligence of his servant committed in the course of his employment (*p*).

(4) A master is liable for the wilful tort of his servant committed within the scope of his employment, and for the general benefit of the master, even though in fact the master derives no benefit therefrom, and though the tort amounts also to a crime.

What constitutes a servant.

The test to be applied to ascertain whether a person doing work for another is or is not his **servant**, is to consider whether the master has complete control of him as to the way he does his work. If he has, the person employed is a servant, and the master is liable for the consequences, because he has made himself responsible not only for the act itself, but for the manner of doing it. Thus, the relation of master and servant is in each case a **question of fact**, depending not on the mode of payment for services, or the time for which the services are engaged, or the nature of those services, or on the power of dismissal (though each of those matters may be taken into consideration), but on the extent of control as to the way in which the work is done.

Scope of employment.

Whether a servant is acting within the scope of his employment is a question partly of law and partly of fact. Generally, as long as a servant is doing the kind of thing for which he is employed, he is acting within the scope of his employment, though he may have had no express command to do the particular thing complained of. But

(*p*) As to the exceptional case of injury done by one servant to another servant working in a common employment under a common master, see Art. 92, *post*.

even whilst doing things of the kind for which he is employed, he gets outside the scope of his employment when he does them not for his master's benefit, but for his own private purposes, as when a coachman, without the permission of his master, takes out his master's carriage and drives it for his own purposes. Art. 27.

(1) Thus where an owner of a carriage was supplied by a livery stable keeper with a driver (who was in his employment as a coachman), and the owner of the carriage was also **owner of the horse and harness**, it was held by RUSSELL, C.J., that in all the circumstances of the case the owner of the carriage had control of the driver as to the manner of driving, and the driver was his servant. The owner of the horse and harness would be the person to give directions as to the way in which the horse should be harnessed and driven, and so had control of the driver as to the way in which he should do his work, and accordingly the owner of the carriage was liable for damage done by the negligence of the driver in driving (*q*). Illustrations. As to who are servants.

(2) But where two ladies, owners of a carriage, *hired horses* from a livery stable, and with the horses a driver, whom they put into their livery, but to whom they did not pay wages, it was held that the driver was not their servant, and they were not liable for his negligence. The ladies would no doubt give directions as to the places to which they should be driven, but not as to the manner in which the horses should be driven (*r*).

(3) It is held that upon the construction of the Metropolitan Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), so far as the public is concerned, the proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire, as if the relationship of master and servant existed between them, although, in fact, no such relationship exists, the relationship apart from statute being that of bailor and bailee, and not that of master and servant (*s*). Cabdrivers.

(*q*) *Jones* v. *Scullard*, [1898] 2 Q. B. 565.
(*r*) *Quarman* v. *Burnett*, 6 M. & W. 499.
(*s*) *Venables* v. *Smith*, 2 Q. B. D. 279; and *King* v. *London Improved Cab Co.*, 23 Q. B. D. 281 [C. A.].

Art. 27.

But if the driver is in fact the servant of some person other than the proprietor, that person may also be liable as the driver's master (*t*).

Servant for particular purpose

(4) In *Rourke* v. *White Moss Colliery Co.* (*u*), the defendants were sinking a shaft in their colliery and agreed with one Whittle to do the sinking at so much per yard. The defendants agreed to supply an engine and engineer at the mouth of the shaft. The engineer was employed and paid by the defendants, and was their general servant, but was at the time under the orders and control of Whittle, and it was held that he was, for the particular purpose, the servant not of the defendants but of Whittle, and consequently the defendants were not liable for his negligence.

The tort must be committed in the course of the employment.

(5) Where a master entrusted his servant with his carriage for a given purpose, and the servant drove it for another purpose of his own in a different direction, and in doing so drove over the plaintiff, the master was held not to be responsible, on the ground that the wrong was not committed in the course of his employment (*x*). But if the servant when going on his master's business had merely taken a somewhat longer road, such a deviation would not have been considered as taking him out of his master's employment (*y*).

Course of employment.

(6) And where a servant does a kind of work for which he is not engaged, he is not acting within the course of his employment so as to make the master liable for his negligence. Thus, when an omnibus conductor drove the omnibus, and whilst so doing negligently ran into the plaintiff, it was held that, in the absence of evidence that the conductor was authorised to drive the omnibus, the defendants were entitled to judgment (*z*).

Wilful torts.

(7) In *Barwick* v. *English Joint Stock Bank* (*a*), the defendants were held liable for the fraudulent statements of their

(*t*) *Keen* v. *Henry*, [1894] 1 Q. B. 292.

(*u*) 2 C. P. D. 205 [C. A.], and see *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*, [1893] 1 Q. B. 629 [C. A.].

(*x*) *Storey* v. *Ashton*, L. R. 4 Q. B. 476.

(*y*) *Mitchell* v. *Crasweller*, 22 L. J. C. P. 100.

(*z*) *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530 [C. A.].

(*a*) L. R. 2 Ex. 259 [Ex. Ch.].

Art. 27.

manager made for the benefit of the defendants, and in the course of his business, the statements being made in answer to inquiries by the plaintiff and being to the effect that a customer of the bank was a person of financial stability. These statements were untrue to the knowledge of the manager, and were made with intent to deceive—but not for the benefit of the manager.

(8) But where a bank manager fraudulently told a customer that certain transfers of mortgage debentures were valid, though he knew they were forged, the bank was held not liable for the fraud of the servant as he had committed it not for the benefit of the bank, but **for his own benefit** (*b*).

Tort expressly forbidden.

(9) Where an omnibus driver, contrary to the express instructions of his employers, so drove as to obstruct a rival omnibus with a view to increasing his takings, it was held that his employers were liable, as he was acting at the time in the course of his employment, and, as he thought, for their benefit (*c*). But where a driver to gratify his own spite struck the horses of a rival with his whip, his employers were held not liable (*d*). In the one case the driver was acting for his employers' benefit; in the other solely for his own.

Wrongful arrest by servants.

(10) In *Poulton* v. *London and South Western Rail. Co.* (*e*), a station master having demanded payment for the carriage of a horse conveyed by the defendants, arrested the plaintiff and detained him in custody until it was ascertained by telegraph that all was right. **The railway company had no power whatever to arrest a person for non-payment for carriage of a horse,** and therefore the station master, in arresting the plaintiff, did an act that was wholly illegal, not in the mode of doing it, but in the doing of it at all. Under these circumstances, the court held that the railway company were not responsible for the act of their station

(*b*) *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.*, 18 Q. B. D. 714 [C. A.].

(*c*) *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526.

(*d*) *Croft* v. *Alison*, 4 B. & A. 590.

(*e*) L. R. 2 Q. B. 534.

Art. 27.

master; and MELLOR, J., said: "If the station master had made **a mistake in committing an act which he was authorised to do,** I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station master acts in **a manner in which the company themselves would not be authorised to act,** and under a mistake or misapprehension of what the law is, then I think the rule is very different, and I think that is the distinction on which the whole matter turns."

(11) In an earlier case in which a station master and a policeman employed by a railway company wrongfully arrested a man for not paying his fare, the company was held liable, as **the company had power to arrest a passenger for travelling without paying his fare,** and must be taken to have authorised the officials to take into custody persons whom they believed to be committing that offence. The officials made a mistake in the particular case, but it was "a **mistake made within the scope of their authority**" (*f*).

Assaults by servants.

(12) So, again, in *Bayley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (*g*), the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being pulled violently out of a railway carriage by one of the defendants' porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage. The defendants' byelaws did not expressly authorise the company's servants to remove any person being in a wrong carriage, or travelling therein without having first paid his fare and taken a ticket, and they even contained certain provisions which implied that the passengers should be treated with consideration; but, nevertheless, the court considered that the act of the porter in pulling the plaintiff out of the carriage was an act done in the course of his employment as the defendants' servant.

In that case WILLES, J., says: "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine according to the circumstances that arise, when an act of that class is to be

(*f*) *Goff* v. *Great Northern Rail. Co.*, 3 E. & E. 672.
(*g*) L. R. 7 C. P. 415.

done and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment." Art. 27.

(13) The defendants employed a manager to manage a branch of their business, which was the sale of furniture on the hire-purchase system. The manager sold a piece of furniture to a person living in the plaintiff's house, and on one of the instalments being in arrear he went to the plaintiff's house and removed the furniture. Whilst so doing he assaulted the plaintiff. The jury found that the manager committed the assault in the course of his employment, and it was held that the defendants were liable. The manager was employed to get back the furniture and committed the assault for the purpose of furthering that object and not for private purposes of his own, and the defendants were held liable for the wrongful act of their servant, although the assault was a criminal offence (*h*). Criminal acts.

(14) So, too, a corporation is liable for the libels or slanders published by its servants and uttered within the scope of their employment (*i*), but not for those outside the scope of their employment (*k*).

ART. 28.—*Unauthorised Delegation by Servant.*

A master is not liable for the tortious acts of persons to whom his servant has, without authority, delegated his duties. A servant may have express authority, and in some cases may have implied authority, to delegate his duties to

(*h*) *Dyer* v. *Munday*, [1895] 1 Q. B. 742 [C. A.].
(*i*) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423 [P. C.].
(*k*) *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209.

Art. 28. another, but if without such authority he delegates his duties to another, that other does not become the agent of the master.

Illustrations. (1) Thus, where the driver and conductor of an omnibus authorised a bystander to drive the omnibus (the driver having been ordered to discontinue driving by a policeman who thought he was drunk), and the bystander, whilst driving, negligently injured the plaintiff, it was held that the defendants were not liable as the bystander was not their agent (*l*).

(2) But where the driver of a cart negligently left the cart in custody of a lad whose duty it was to go with the cart to deliver parcels, but had been forbidden to drive, and the lad drove the cart so that it collided with the plaintiff's carriage, the employer of the driver was held liable **for the negligence of the driver in leaving the cart in custody of the lad.** But the employer would not have been liable for the negligence of the lad, as he was not acting within the scope of his employment, and the driver had no authority to delegate the driving to him (*m*).

But see Mann v Ward 5 Times LR 699

ART. 29.—*Servants of the Crown.*

The heads of Government departments and superior officers are not liable for the torts of their subordinates committed in carrying out the business of the Crown unless they have themselves ordered or directed the commission of the tort (*n*).

Explanation. The head of a Government department is not the master of the Government servants belonging to the department; nor are soldiers or naval seamen the servants of the officers

(*l*) *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84 [C. A.].
(*m*) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240 [C. A.].
(*n*) *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178 [C. A.].

who command them. All are servants of the Crown, serving under a common master. Though the soldier is absolutely subject to the orders of his officer he is no more his servant in law than is a stable boy the servant of the coachman, or a railway porter the servant of the station-master or the general manager of a railway company (*o*). Art. 29.

SECTION V.—LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTORS.

ART. 30.—*The General Rule.*

(1) A principal is not liable for the collateral negligence of an independent contractor, that is, for a negligent act or omission which arises incidentally in the course of the performance of the work.

(2) But to this rule there are three exceptions:

(a) Where an independent contractor is employed to do an act unlawful in itself the principal is liable for the direct consequences of such act, and is also liable for the consequences of the agent's negligence in the course of doing the act (*p*).

(b) If the principal is under an obligation by contract or statute to do a particular thing, and he employs an independent contractor to do it, he is liable if the contractor neglects to do the thing, or does it improperly. He cannot

(*o*) *Stone* v. *Cartwright*, 6 Term Rep. 411.

(*p*) *Ellis* v. *Sheffield Gas Consumers Co.*, 2 E. & B. 767, p. 66, *post*.

Art. 30.

get rid of his duty by employing an agent (*q*).

(c) Where the thing which the independent contractor is employed to do will be a nuisance, or is likely in the ordinary course of events to cause damage, unless proper precautions are taken, the principal is liable for the neglect of the contractor to take those precautions (*r*).

Comment on above rule.

It will be noticed that the liability of one who employs another to do work is not so extensive where the person employed is an independent contractor as it is where that other is a servant. A master has control of the servant as to the way he does his work, and it is his duty to see that the work is so done as not to cause damage to others—so he is liable for the collateral negligence of the servant. When an independent contractor is employed, the principal is only liable for acts which he has expressly or impliedly authorised. But a person who is under a duty to do something cannot evade that duty by deputing its performance to another. So if a person is under an obligation to do something and he employs an agent to do it, he is responsible for any neglect of the agent to properly perform that duty.

So, too, if a person chooses to do something which he does at his peril, or something which will be dangerous if not properly done, he must see that the person he employs to do the work does it properly. Having authorised the work, he cannot escape responsibility for its being carried out in such a manner as not to be dangerous.

Pickard v. *Smith.*

In the leading case (*s*) a railway company had let the refreshment rooms and a coal cellar to the defendant, Smith. The opening for shooting the coals into the cellar

(*q*) *Hole* v. *Sittingbourne and Sheerness Rail. Co.*, 6 H. & N. 488.
(*r*) *Hughes* v. *Percival*, 8 App. Cas. 443.
(*s*) *Pickard* v. *Smith*, 10 C. B. (N.S.) 470.

Art. 30.

was on the arrival platform. Whilst the servants of a coal merchant (an independent contractor) were shooting coals into the cellar for Smith, the plaintiff, a passenger on the railway, in passing out of the station, without any fault on his part, fell into the cellar opening which was insufficiently guarded owing to the negligence of the servants of the coal merchant. The court held that Smith was liable, although the coal merchant was an independent contractor and his servants were not Smith's servants. WILLIAMS, J., in delivering the judgment of the court, said: "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently if an independent contractor is employed to do a lawful act and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. . . . That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor by a parity of reasoning to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer and neglects its fulfilment whereby an injury is occasioned. Now, in the present case, the defendant employed the coal merchant to open the trap in order to put in the coals, and he trusted him to guard it whilst open and to close it when the coals were all put in. The act of opening it was the act of the employer though done through the agency of the coal merchant; and the defendant having thereby caused danger was bound to take reasonable means to prevent mischief. The performance of this duty he omitted, and the fact of his having entrusted it to a person who also neglected it furnishes no excuse, either in good sense or law."

Illustrations. Independent contractors.

(1) A railway company was empowered by Act of Parliament to construct a railway bridge over a highway. The company employed a contractor to do the work. A servant of the contractor negligently caused the death of a person passing underneath on the highway by allowing a stone to fall on him. The contractor would no doubt have been

Art. 30.

liable for the negligence of his servant, but in an action brought by the administratrix of the deceased against the railway company the defendants were held not liable for the negligence of the workman, being that of an agent who was not their servant, and merely collateral to the work which he was employed to do (*t*).

Illustrations of exceptions.

(2) A company, not authorised to interfere with the streets of Sheffield, directed their contractor to open trenches therein; the contractor's servants in doing so left a heap of stones, over which the plaintiff fell and was injured. Here the defendant company was held liable, as the interference with the streets was in itself an unlawful act (*u*).

(3) So where the defendants were authorised, by an Act of Parliament, to construct an opening bridge over a navigable river, a duty was cast upon them to construct it properly and efficiently; and the plaintiff having suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable under exception (b), and could not excuse themselves by throwing the blame on their contractors (*x*).

(4) Plaintiff and defendant were owners of two adjoining houses, plaintiff being entitled to have his house supported by defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the house. The contractor undertook the risk of supporting the plaintiff's house as far as might be necessary during the work, and to make good any damage and satisfy any claims arising therefrom. Plaintiff's house was injured in the progress of the work, owing to the means taken by the contractor to support it being insufficient:—*Held*, on the principle above laid down (exception (c)), that the defendant was liable (*y*).

(5) A district council employed a contractor to make up a highway, which was used by the public but was not

(*t*) *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same*, 4 Ex. 244.

(*u*) *Ellis* v. *Sheffield Gas Consumers Co.*, 23 L. J. Q. B. 42.

(*x*) See *Hole* v. *Sittingbourne and Sheerness Rail. Co.*, 6 H. & N. 488.

(*y*) *Bower* v. *Peate*, 1 Q. B. D. 321, approved in *Dalton* v. *Angus*, 6 App. Cas. 740, and *Hughes* v. *Percival*, 8 App. Cas. 443.

Art. 30.

repairable by the inhabitants at large. In carrying out the work the contractor negligently left on the road a heap of soil unlighted and unprotected. The plaintiff, walking along the road after dark, fell over the heap and was injured. In an action against the district council and the contractor to recover damages, it was held that, as from the nature of the work danger was likely to arise to the public using the road, unless precautions were taken, the negligence of the contractor was not collateral to his employment, and the district council (as well as the contractor) were liable (*z*).

(6) Where the defendant maintained a lamp hanging over a highway for his own purposes, it was his duty to maintain it so as not to be dangerous to the public, and when he employed a contractor to repair it, but the contractor did his work badly, the defendant was liable for injury caused thereby to a person passing on the highway (*a*).

(7) Where a contractor was employed to clear and burn the bush on land belonging to the defendants, and he negligently lit a fire on the land and permitted it to spread on to the plaintiff's land, the defendants were held liable, even though the contractor in lighting the fire had disregarded the express stipulations as to the time at which the fire should be lit, on the ground that, having authorised the lighting of the fires, they were bound not only to stipulate that precautions should be taken, but to see that they were taken (*b*). also on principle of Rylands v. Fletcher

(*z*) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72 [C. A.]; and see *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392 [C. A.].

(*a*) *Tarry* v. *Ashton*, 1 Q. B. D. 314.

(*b*) *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48 [P. C.].

CHAPTER VII.

THE EFFECT OF THE DEATH OR BANKRUPTCY OF EITHER PARTY.

SECTION I.—COMMON LAW.

ART. 31.—*Death generally destroys the Right of Action.*

(1) As a general rule, the right to sue and the liability to be sued for torts ceases with the life of either party.

(2) This rule does not apply where the tort was committed **by the deceased** and consists of:

(a) The appropriation by the deceased of property (or the proceeds or value of property) belonging to the plaintiff (*a*); or

(b) An injury to real or personal property committed by the deceased within six calendar months of his death (*b*).

The rule does not apply when the death is that of **the person who would have been plaintiff** if he had lived, and the tort consists of:

(a) An injury to *real* property of the deceased, committed within six calendar months of his death (*c*); or

(*a*) *Phillips* v. *Homfray*, 24 Ch. D. 439 [C. A.].

(*b*) 3 & 4 Will. 4, c. 42, s. 2; see *Kirk* v. *Todd*, 21 Ch. D. 484 [C. A.]. The action must be brought within six months of constitution of a personal representative.

(*c*) *Ibid.* The action must be brought within twelve months of death.

Art. 31.

(b) An injury to the personal property of the deceased (*d*).

NOTE.—Where the death is that of the person injured the rule "*actio personalis moritur cum personâ*" only applies to torts of a purely personal nature, such as libel and assault; it does not apply to any torts whereby the personal property of the deceased has suffered (*e*).

Illustrations. (1) An action to restrain the infringement of a registered trade mark may be brought by the executors of the owner of the trade mark, in the event of his dying before action brought, or, if brought, may be continued by his executors after his death (*f*).

(2) The case of *Hatchard* v. *Mège* (*g*) is an excellent example of the rule under consideration. There it was held that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade mark, was put an end to by the death of the plaintiff after the commencement of the action **only so far as it was a claim for libel**; but so far as the alleged tort was in the nature of slander of title, the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage.

ART. 32.—*Effect of Bankruptcy.*

(1) The right of action in tort belonging to one who becomes bankrupt, is not affected by his bankruptcy, unless the tort is one which causes actual loss to his estate, in which case the right passes to his trustee (*h*).

(*d*) 4 Edw. 3, c. 7; 25 Edw. 3, c. 5.
(*e*) *Twycross* v. *Grant*, 4 C. P. D. 40.
(*f*) *Oakey & Son* v. *Dalton*, 35 Ch. D. 700.
(*g*) 18 Q. B. D. 771.
(*h*) See *Wright* v. *Fairfield*, 2 B. & Ad. 727; *Beckham* v. *Drake*, 2 H. L. Cas. 579; *Brewer* v. *Dew*, 11 M. & W. 625; *Hodgson* v. *Sidney*, L. R. 1 Ex. 313; *Ex parte Vine, Re Wilson*, 8 Ch. D. 364 [C. A.].

(2) A right of action for tort against one who becomes bankrupt, is not destroyed by the bankruptcy, nor can the plaintiff prove in the bankruptcy for compensation (*i*). Art 32.

Illustrations.

(1) Thus a bankrupt may, even during the continuance of the bankruptcy, sue another for libel or assault, or for seduction of his servant (*k*); and may, it is conceived, keep any damages which he may recover for his own use and benefit (*l*).

(2) So in an action for trespass and seizure of goods in which the plaintiff alleged damage to the goods, damage to the premises, and personal annoyance to himself and his family, and it was admitted that no substantial damage was done to the premises or the goods, it was held that the right of action did not pass to the trustee in bankruptcy (*m*).

(3) But where a tort in respect of property causes actual damage, so as to inflict loss on the bankrupt's creditors, the right of action passes to the trustee, and the bankrupt loses the right of suing for the abstract tort to his right (*n*), unless there were two distinct causes of action (*n*).

SECTION II.—STATUTORY LIABILITY FOR CAUSING DEATH.

ART. 33.—*Actions by Personal Representatives of Persons killed by Tort.*

(1) Whenever the death of a person is caused by a wrongful act, neglect or default of another which would (if death had not ensued) have Lord Campbell's Act.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (2), and s. 37; *Watson* v. *Holliday*, 20 Ch. D. 780; 52 L. J. Ch. 543; *Ex parte Stone, Re Giles*, 37 W. R. 767.

(*k*) *Beckham* v. *Drake*, p. 70, *ante*. (*l*) *Ex parte Vine*, p. 70, *ante*.

(*m*) *Rose* v. *Buckett*, [1901] 2 K. B. 449.

(*n*) *Brewer* v. *Dew*, p. 70, *ante*; and *Hodgson* v. *Sidney*, p. 70, *ante*.

Art. 33.

entitled the party injured to maintain an action in respect thereof, then the wrongdoer is liable to an action, even although the circumstances amount in law to a felony (*o*).

(2) Every such action must be for the benefit of the wife, husband, parent and child of the deceased, and must be brought by and in the name of the executor or administrator of the deceased person (*p*).

(3) Where there is no personal representative, or no action is brought by him within six months, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative could have sued (*q*).

(4) In every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought. The amount so recovered, after deducting the costs not recovered from the defendant, is divided amongst the before-mentioned parties (or such of them as may be in existence) in such shares as the jury by their verdict may direct (*r*).

(5) Not more than one action lies for the same cause of complaint, and every such action must be commenced within one year after the death of the deceased (*s*).

Explanation. At common law no action lay against any person who by his wrongful act, neglect, or default caused the immediate

(*o*) Fatal Accidents Act, 1846 (usually called Lord Campbell's Act) (9 & 10 Vict. c. 93), s. 1.

(*p*) *Ibid.*, s. 2.

(*q*) 27 & 28 Vict. c. 95, s. 1; and see *Holleran* v. *Bagnell*, 4 L. R. Ir. 740.

(*r*) 9 & 10 Vict. c. 93, s. 2. (*s*) 9 & 10 Vict. c. 93, s. 4.

death of another person, even though damage was thereby directly caused to others by being deprived of his services or support. Still less could his personal representatives bring an action in respect of the wrong committed to the deceased himself. And this is still the law, except in so far as an action lies under Lord Campbell's Act. So a master cannot bring an action for injuries which cause the immediate death of his servant, though he suffers loss by being deprived of those services, nor can a father recover in respect of the funeral expenses incurred by reason of the death of his daughter caused by the negligence of the defendant (*t*). Art. 33.

Points to be noted.

The following points must be remembered—

(1) No action lies unless, had the deceased lived, he himself could have maintained an action at the time of his death. So it is a good defence that the deceased would have had no cause of action as his injuries were caused by his contributory negligence (*u*). So, too, if the deceased's cause of action would at the time of his death have been barred by a Statute of Limitations (*x*), or by his having accepted satisfaction for his injuries (*y*), or agreed not to sue (*z*), no action can be brought under the Act.

(2) Every such action must be brought for the benefit of the wife, husband, parent and child of the deceased. **Parent** includes a grand-parent and a step-parent. **Child** includes a grand-child and a step-child, and a child *en ventre sa mère* (*a*), but not a bastard (*b*). The jury apportion the damages amongst these persons in such shares as they may think proper.

(*t*) *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.]. But the rule does not apply where the cause of action is *breach of contract* and the death was part of the damages (*Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193). It has been held that where by the negligence of the defendant a servant is *injured* but not killed, the master may bring an action for loss of services, *sed quære* (*Berringer* v. *Great Eastern Rail. Co.*, 4 C. P. D. 163).

(*u*) *Pym* v. *Great Northern Rail. Co.*, 4 B. & S. 396 [Ex. Ch.].

(*x*) *Williams* v. *Mersey Dock Board*, [1905] 1 K. B. 804 [C. A.].

(*y*) *Read* v. *Great Eastern Rail. Co.*, L. R. 3 Q. B. 555.

(*z*) *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357.

(*a*) *The George and Richard*, L. R. 3 A. P. & E. 466; 24 L. T. 717.

(*b*) *Dickinson* v. *North Eastern Rail. Co.*, 2 H. & C. 735.

Art. 33.

What damage must be proved.

(3) The persons for whose benefit the action is brought must have suffered some pecuniary loss by the death of the deceased (*c*). "*Pecuniary* loss" means "some substantial detriment in a worldly point of view." Thus, loss of reasonably anticipated pecuniary benefits, loss of education or support is sufficient (*d*): as where the plaintiff was old and infirm and had been partly supported by his son, the deceased (*e*). Even loss of mere gratuitous liberality is sufficient (*f*). But where a father employed his son, who was a skilled workman, at the current rate of wages, and the son did not contribute to the father's support, it was held that the father had no claim, as he had suffered no pecuniary loss by the death of his son (*g*).

(4) But "where a man has no means of his own and earns nothing, his wife or children cannot be pecuniary losers by his decease. In the like manner when by his death the whole estate from which he derived his income passes to his widow or to his child (as was the case in *Pym* v. *Great Northern Rail. Co.* (*h*), no statutory claim will lie at their instance" (*i*). So, too, the jury cannot, in such cases, take into consideration the grief, mourning, and funeral expenses to which the survivors were put. And this seems reasonable: for, in the ordinary course of nature, the deceased would have died sooner or later, and the grief, mourning, and funeral expenses would have had to be borne then, if not at the time they were borne (*k*).

(5) If the deceased obtained compensation during his lifetime, no further right of action accrues to his representatives on his decease (*l*).

(*c*) *Franklin* v. *South Eastern Rail. Co.*, 3 H. & N. 211.

(*d*) *Pym* v. *Great Northern Rail. Co.*, 4 B. & S. 396 [Ex. Ch.]; *Franklin* v. *South Eastern Rail. Co.*, *supra*.

(*e*) *Hetherington* v. *North Eastern Rail. Co.*, 9 Q. B. D. 160.

(*f*) *Dalton* v. *South Eastern Rail. Co.*, 27 L. J. C. P. 227.

(*g*) *Sykes* v. *North Eastern Rail. Co.*, 44 L. J. C. P. 191.

(*h*) 2 B. & S. 759 [Ex. Ch.].

(*i*) *Per* Lord WATSON in *Grand Trunk Rail. Co. of Canada* v. *Jennings*, 13 App. Cas. 800, 804.

(*k*) *Blake* v. *Midland Rail. Co.*, 18 Q. B. 93; *Dalton* v. *South Eastern Rail. Co.*, 4 C. B. (N.S.) 296; *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.].

(*l*) *Read* v. *Great Eastern Rail. Co.*, L. R. 3 Q. B. 555. But see *Daly* v. *Dublin, Wicklow and Wexford Rail. Co.*, 30 L. R. Ir. 514 [C. A.], where the Irish courts decided *contra*.

Art. 33.

Insurance not to be taken into account.

(6) It was formerly held that where the deceased had insured his life the jury in assessing damages ought to take into account the value of the policy payable on his death in diminution of damages. This is now, however, altered by the **Fatal Accidents Act, 1908** (*m*), by which the rule under Lord Campbell's Act is made the same as in common law actions for damages (*n*), and "*any sum paid or payable on the death of the deceased under any contract of assurance or insurance*" *is not to be taken into account.*

(*m*) 8 Edw. 7, c. 7.

(*n*) See Art. 40, *post*.

CHAPTER VIII.

OF DAMAGES IN ACTIONS FOR TORT.

Art. 34.—*Damages for Personal Injury.*

There is no fixed rule for estimating damages in cases of injury to the person, reputation, or feelings, and the finding of the jury will only be disturbed—

(a) Where the amount of the damages awarded is so excessive that no twelve men could reasonably have given it (*a*);

(b) Where the court comes to the conclusion from the amount or other circumstances that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages (*b*);

(c) Where the smallness of the award shows that they have either failed to take into consideration some essential element (*c*), or have compromised the question (*d*).

Comment.

The court will not interfere with the verdict of a jury merely on the ground that the damages awarded (*dd*) are more than the court itself would have awarded. The court must be satisfied that the jury has not really acted reasonably on

(*a*) *Praed* v. *Graham*, 24 Q. B. D. 53.
(*b*) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.].
(*c*) *Phillips* v. *London and South Western Rail. Co.*, 4 Q. B. D. 406.
(*d*) *Falvey* v. *Stanford*, L. R. 10 Q. B. 54.
(*dd*) *Britton* v. *South Wales Rail. Co.*, 27 L. J. Ex. 355.

Art. 34. the evidence, but has been misled by prejudice or passion, or has acted on a wrong principle (*e*). The only power of the court, if they think the damages excessive, is to send the case down for a new trial. They cannot (except by consent) usurp the functions of a jury, and themselves assess the damages (*f*).

So, in an action for false imprisonment, libel, or malicious prosecution, the jury may take into account the injured feelings and reputation of the plaintiff, and not merely his pecuniary loss.

Assault. Thus, to beat a man publicly, is a greater insult and injury than to do so in private, and is accordingly ground for aggravation of damages (*g*).

ART. 35.—*Damages for Injury to Property.*

(1) The damages in respect of injuries to property are to be estimated upon the basis of being compensatory for the deterioration in value caused by the wrongful act of the defendant, and for all natural and necessary expenses incurred by reason of such act (*h*).

(2) In actions for trespass to real property the measure of damages is the loss the plaintiff has sustained in consequence of the wrongful acts of the defendant, and not the benefit which accrues to the latter.

(3) When the wrong consists in depriving the plaintiff of his personal property the measure of damages is the market value of the property at the time of the commission of the wrong.

(*e*) *Per* Lord HALSBURY, L.C., in *Watt* v. *Watt*, [1905] A. C. 115; *Johnston* v. *Great Western Rail. Co.*, 2 K. B. 250 [C. A.].

(*f*) *Watt* v. *Watt*, [1905] A. C. 115.

(*g*) *Tullidge* v. *Wade*, 3 Wils. 18.

(*h*) See *Rust* v. *Victoria Dock Co.*, 36 Ch. D. 113 [C. A.].

Art. 35.

(4) Where the wrong results in the plaintiff's being temporarily deprived of the use of personal property the measure of damages is the value of the use of which he is deprived.

Conversion.

(1) Thus, for the conversion of chattels, the full market value of the chattel at the date of the conversion, is, in the absence of special damage, the true measure. Where the conversion consists in a refusal to deliver them up to the person entitled to them, the value at the time of the refusal is the measure of damages (*i*).

If there is no market value, the actual value must be ascertained otherwise (*j*).

Trespass to land.

(2) Where the defendant cut a ditch across the plaintiff's land, the measure of damages was the diminution in value of the land, and not the cost of restoring it (*k*).

(3) In *Whitwham* v. *Westminster Brymbo Coal and Coke Co.* (*l*), another principle was applied in peculiar circumstances. The defendants had wrongfully tipped on the plaintiff's land spoil from a colliery, and it was held that in the special circumstances the value of the land to *the defendants* for tipping purposes was the proper measure, as the defendants had had the use of the plaintiff's land for years, and they ought not to do this without paying for it.

Taking coal.

(4) So, where coal has been taken, by working into the mine of an adjoining owner, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal (*m*).

Loss of use of a chattel.

(5) Where, owing to a collision, the plaintiffs lost the use of a dredger for some weeks, they were entitled to recover

(*i*) *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521 [C. A.].
(*j*) *France* v. *Gaudet*, L. R. 6 Q. B. 199.
(*k*) *Jones* v. *Gooday*, 8 M. & W. 146.
(*l*) [1896] 2 Ch. 538.
(*m*) *In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46 [C. A.].

Art. 35. as damages for the loss of the use of the dredger a sum equivalent to the cost of hiring such a dredger, although they were not out of pocket in any definite sum (*n*). And where a harbour board lost the use of a lightship by reason of its being damaged by collision, they recovered not only the cost of the repairs, but a sum for the loss of the use of the lightship, although its place was taken by a spare lightship they kept in reserve (*o*).

ART. 36.—*Presumption of Damage against a Wrong-doer.*

If a person who has wrongfully converted property, refuses to produce it, it will be presumed as against him to be of the best description (*p*).

Illustrations. (1) Thus, in the leading case (*p*), where a jeweller who had wrongfully converted a jewel which had been shown to him, and had returned the socket only, refused to produce it in order that its value might be ascertained, the jury were directed to assess the damages on the presumption that the jewel was of the finest water, and of a size to fit the socket; for *Omnia præsumuntur contra spoliatorem.*

(2) So, where a diamond necklace was taken away, and part of it traced to the defendant, it was held that the jury might infer that the whole thing had come into his hands (*q*).

(*n*) *The Greta Holme*, [1897] A. C. 596.
(*o*) *The Mediana*, [1900] A. C. 113.
(*p*) *Armory* v. *Delamirie*, 1 Str. 504; 1 Sm. L. C. 356.
(*q*) *Mortimer* v. *Cradock*, 12 L. J. C. P. 166.

ART. 37.—*Consequential Damages.*

Art. 37.

Where any special damages have **naturally** and in sequence resulted from the tort, they may be recovered; but not otherwise.

The difficulty in cases under this rule, is to determine what damages are the *natural* result, and what are too remote.

Illustrations.

Loss of earnings.

(1) If, through a person's wilful or negligent conduct, corporal injury is inflicted on another, whereby he is partially or totally prevented from attending to his business, the pecuniary loss suffered in consequence may be recovered, for it is the natural result of the *injuria* (*r*).

Mental shock.

(2) Where the tort occasions as a natural result mental shock, damages may be recovered in respect thereof. It was long doubted whether mental shock caused by fright without any bodily injury was a subject for damages, but it has now been decided that damages are recoverable in respect thereof (*s*).

Medical expenses.

(3) So, the medical expenses incurred may be recovered if they form a legal debt owing from the plaintiff to the physician, but not otherwise (*t*).

Infection.

(4) A cattle-dealer sold to the plaintiff a cow, fraudulently representing that it was free from infectious disease, when he knew that it was not; and the plaintiff having placed the cow with five others, they caught the disease and died. It was held that the plaintiff was entitled to recover as damages the value of all the cows, as their death was the

(*r*) *Phillips* v. *London and South Western Rail. Co.*, 4 Q. B. D. 406; *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.].

(*s*) *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669—an action for negligence; and *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57—an action for damages for shock caused by the defendant, as a practical joke, falsely telling the plaintiff that her husband had had his legs broken in an accident.

(*t*) *Dixon* v. *Bell*, 1 Stark. 287; and see *Spark* v. *Heslop*, 28 L. J. Q. B. 197.

Art. 37.

natural consequence of his acting on the faith of the defendant's representation (*u*).

Loss of ship.

(5) So, where a steamer (wholly to blame) collided with a sailing vessel, and destroyed its instruments of navigation, and in consequence of that loss, the sailing ship ran ashore, and was lost while making for port, it was held that the loss of the ship was the natural result of the collision, and that owners of the steamer were liable (*x*).

ART. 38—*Prospective Damages.*

The damages awarded must include the probable future injury which will result to the plaintiff from the defendant's tort.

Illustrations.

Bodily injuries.

(1) So, when a young man of twenty-eight, who had been trained as a marine engineer, and intended to follow it as his profession but had not obtained a post, and was working for his father at a salary of £3 a week, was injured in a railway accident, it was held that £3,000 damages were not excessive. The salary which he would have been probably able to earn was £500 a year, and his physical condition prevented him from earning it. £3,000 represented his prospective loss from this cause (*y*).

Injury to trade.

(2) So, in estimating the damages in an action for libelling a tradesman, the jury should take into consideration the prospective injury which will probably happen to his trade in consequence of the defamation (*z*).

Damage to property and person distinct torts.

(3) But where the same wrongful act causes damage to goods, and also damage to the person, it has been held that there were two distinct causes of action, for which separate proceedings might be prosecuted (*a*).

(*u*) *Mullett* v. *Mason*, L. R. 1 C. P. 559.
(*x*) *The City of Lincoln*, 15 P. D. 15 [C. A.].
(*y*) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.].
(*z*) *Gregory* v. *Williams*, 1 C. & K. 568.
(*a*) *Brunsden* v. *Humphrey*, 14 Q. B. D. 141 [C. A.].

Art. 38.

Continuing torts.

(4) And if the tort be a continuing tort, the principle does not apply; for in that case a fresh cause of action arises *de die in diem*. Thus, in a continuing trespass or nuisance, if the defendant does not cease to commit the trespass or nuisance after the first action, he may be sued until he does. Whether, however, there *is* a continuing *tort*, or merely a continuing **damage**, is often a matter of difficulty to determine.

Successive subsidences caused by one act of defendant.

(5) In the recent case of *Darley Main Colliery Co.* v. *Mitchell* (*b*), the appellants worked their mines too close to the respondent's property, and in consequence some cottages of the respondent were injured in 1868, and were repaired by the appellants. In 1882, in consequence **of the same workings which caused the damage of 1868,** a further subsidence took place, and the respondent's cottages were again injured. The case turned on the question of whether the respondent was barred by the Statute of Limitations, but incidentally it was decided that the tort was not the excavation, but the causing the respondent's land to subside. The excavation was no doubt the cause of the subsidence, but the tort itself was damage resulting from the infringement of the respondent's right of support, and consequently each separate subsidence was a distinct and separate cause of action for which a new action would lie.

ART. 39.—*Aggravation and Mitigation.*

The jury may look into all the circumstances, and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*c*).

Illustrations.

Seduction under guise of courtship.

(1) In seduction, if the defendant had committed the offence under the guise of honourable courtship, that is

(*b*) 11 App. Cas. 127.

(*c*) *Davis* v. *London and North Western Rail. Co.*, 7 W. R. 105.

Art. 39.

ground for aggravating the damages; not, however, on account of the breach of contract, for that is a separate offence, and against a different person. "The jury did right, in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings an action for breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (*d*).

Character of girl seduced.

(2) On the other hand, the previous loose or immoral character of the party seduced is ground for mitigation. The using of immodest language, for instance, or submitting herself to the defendant under circumstances of extreme indelicacy (*dd*).

Plea of truth in defamation.

(3) In actions for defamation, a plea of truth is matter of aggravation unless proved, and may be taken into consideration by the jury in estimating the damages (*e*).

Plaintiff's bad character in defamation.

(4) Evidence of the plaintiff's *general bad character* is allowed in mitigation of damages in cases of defamation. But although evidence of general reputation of bad character is admissible, evidence of rumours and suspicions before the publication of the libel that the plaintiff had done what was charged in it, or of facts showing the misconduct of the plaintiff, is not admissible (*f*).

Insolent trespass.

(5) Where a person trespassed upon the plaintiff's land, and defied him, and was otherwise very insolent, and the jury returned a verdict for £500 damages, the court refused to interfere, GIBBS, C.J., saying: "Suppose a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains

(*d*) *Per* WILMOT, C.J., in *Tullidge* v. *Wade*, 3 Wils. 18.

(*dd*) See *Verry* v. *Watkins*, 7 C. & P. 308.

(*e*) *Warwick* v. *Foulkes*, 12 M. & W. 507.

(*f*) See *Scott* v. *Sampson*, 8 Q. B. D. 491, and *Wood* v. *Durham* (*Earl*), 21 Q. B. D. 501; and as to giving particulars, see R. S. C., Order XXXVI., r. 37.

there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done'? Would that be a compensation?" (*g*). Art. 39.

ART. 40.—*Insurance not to be taken into Account.*

In assessing damages whether for personal injuries or for injuries to property the jury ought not to take into account any sum which may be paid or payable to the plaintiff under any policy of insurance (*h*).

NOTE.—So where a plaintiff sued for damages for personal injuries received in a railway accident, and the jury found as damages £217, and it appeared that the plaintiff was entitled to receive £31 on an accident policy, it was held that the sum awarded by the jury ought *not* to be reduced by the sum of £31. If it were otherwise the defendant would get the benefit of the plaintiff's having insured, and in some cases might have to pay nothing. Insurance is a matter between the insurer and the assured, and ought not to affect the liability of the wrongdoer to pay in full the damages caused by his tort (*h*).

(*g*) *Merest* v. *Harvey*, 25 Taunt. 441.

(*h*) *Bradburn* v. *Great Western Rail. Co.*, L. R. 10 Ex. 1, and see *Yates* v. *Whyte*, 4 Bing. N. C. 272.

CHAPTER IX.

OF INJUNCTIONS TO PREVENT THE CONTINUANCE OF TORTS.

An injunction is an order of a court (*a*) restraining the commission or continuance of some act (*b*). Definition.

Injunctions are either interlocutory or perpetual. An interlocutory injunction is a temporary injunction, granted summarily on motion (*c*) founded on an affidavit, and before the facts in issue have been formally tried and determined. Such an injunction is granted to restrain the commission or continuance of some act until the court has decided whether a perpetual injunction ought to be granted. A perpetual injunction is one which is granted after the facts in issue have been tried and determined, and is given by way of final relief. Interlocutory or perpetual.

Art. 41.—*Injuries Remediable by Injunction.*

(1) Wherever a legal right, whether in regard to property or person, exists, a violation of that right will be prohibited in all cases where the injury is such as is not susceptible of being adequately compensated by damages, or at least not without the necessity of a multiplicity of actions for that purpose (*d*).

(*a*) A county court has now, in actions within its jurisdiction, power to grant an injunction against a nuisance, and to commit to prison for disobedience thereof (*Ex parte Martin*, 4 Q. B. D. 212; affirmed *sub nom. Martin* v. *Bannister*, *ibid.* 491 [C. A.]).

(*b*) As to mandatory injunctions, and as to the general principles guiding the courts in granting or refusing injunctions, see Strahan and Kenrick's Digest of Equity, Book III., s. 3.

(*c*) In the King's Bench Division applications for interlocutory injunctions are made by summons in chambers.

(*d*) *Imperial Gas Light and Coke Co. Directors* v. *Broadbent*, 7 H. L. Cas. 600.

Art. 41.

Damages instead of injunction.

(2) The court has jurisdiction to give damages instead of granting an injunction, and will generally do so in cases where there are found in combination the four following requirements, viz., where the injury to the plaintiff's legal rights (1) is small, (2) is capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction (*e*).

Interlocutory injunctions.

(3) To entitle a plaintiff to an **interlocutory** injunction, the court must be satisfied that there is a serious question to be tried at the hearing, and that, on the facts before it, there is a probability that the plaintiff is entitled to relief (*f*).

To restrain publication of libel.

(4) An interlocutory injunction will be granted to restrain the publication of a libel, even though such libel affects the plaintiff in his character only, and not in his business. But an injunction to restrain the publication of a libel will only be granted in the clearest cases (*g*).

Illustrations.

Nuisances.

(1) Thus, where substantial damages would be, or have been, recovered for injury done to land, or the herbage thereon, by smoke or noxious fumes, an injunction will be granted to prevent the continuance of the nuisance; for otherwise the plaintiff would have to bring continual actions (*h*).

(2) And so where a railway company, for the purpose of constructing their works, erected a mortar mill on part of

(*e*) *Per* BAGGALLAY, L.J., in *Sayers* v. *Collyer*, 28 Ch. D. 103 [C. A.], at p. 108; *Serrao* v. *Noel*, 15 Q. B. D. 549 [C. A.]; and *per* A. L. SMITH, L.J., in *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287 [C. A.], at p. 322.

(*f*) *Per* COTTON, L.J., *Preston* v. *Luck*, 27 Ch. D. 497 [C. A.], at p. 506.

(*g*) *Bonnard* v. *Perryman*, [1891] 2 Ch. 269 [C. A.]; *Monson* v. *Tussaud's*, *Limited*, *Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 671 [C. A.].

(*h*) *Tipping* v. *St. Helen's Smelting Co.*, L. R. 1 Ch. 66.

their land close to the plaintiff's place of business, so as to cause great injury and annoyance to him by the noise and vibration, it was held that he was entitled to an injunction to restrain the company from continuing the annoyance (*i*). Art. 41.

(3) As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the sense of hearing. Noise caused by the ringing of church bells, if sufficient to annoy and disturb residents in the neighbourhood in their homes or occupations, is a nuisance, and will be restrained (*k*).

(4) So, where one has gained a right to the free access of light to his house, and buildings are erected which cause a substantial privation of light sufficient to render the occupation of the house uncomfortable, according to the ordinary notions of mankind, and to prevent the plaintiff from carrying on his business on the premises as beneficially as before, an injunction will be granted in cases in which damages do not afford an adequate remedy (*l*). Interference with light.

(5) An injunction will not be granted against a local authority who are committing a nuisance by sewage pollution when it is legally impossible for the authority to obey the terms of the injunction, because they have no power to stop up their sewers or prevent persons from using them, or when it is physically impossible. In such cases damages will be given instead (*m*). Sewage pollution.

(6) It was formerly held that an injunction could not be granted to restrain the publication of a personal libel, even where it injuriously affected property (*n*). However, since the Judicature Act, 1873, the court has power to grant an injunction whenever it may appear to be just or convenient (s. 25 (8)). For some time the court was inclined to Libel.

(*i*) *Fenwick* v. *East London Rail. Co.*, 20 Eq. 544 ; but see *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, in which the former case was distinguished.

(*k*) *Soltau* v. *De Held*, 2 Sim. (N.S.) 133.

(*l*) See *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179.

(*m*) *Att.-Gen.* v. *Dorking Union*, 20 Ch. D. 595 [C. A.] ; *Earl of Harrington* v. *Derby Corporation*, [1905] 1 Ch. 205.

(*n*) *Gee* v. *Pritchard*, 2 Swan. 402 ; *Clark* v. *Freeman*, 11 Beav. 112 ; *Prudential Assurance Co.* v. *Knott*, 10 Ch. App. 142.

Art. 41.

restrict this power to cases where a libel prejudicially affected property (*o*); but it may now be considered settled that the court **has jurisdiction** to grant injunctions to restrain the publication of all libels (*p*); or even oral slanders (*q*). However, the court is extremely chary of granting **interlocutory** injunctions in cases of libel. As Lord ESHER, M.R., said in *Coulson & Sons* v. *Coulson & Co.* (*r*): "To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. *It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the court would set aside the verdict as unreasonable.*"

ART. 42.—*Public Convenience does not justify the continuance of a Tort.*

It is no ground for refusing an injunction that it will, if granted, do an injury to the public.

Illustrations.

(1) Thus, in the case of *Att.-Gen.* v. *Birmingham Borough Council* (*s*), where the defendants had poured their sewage into a river, and so rendered its water unfit for drinking and incapable of supporting fish, it was held that the legislature not having given them express powers to send their sewage into the river, their claim to do so, on the ground that the population of Birmingham would be injured if they were restrained from carrying on their operations, was untenable.

(2) And where a railway company were forbidden by statute to run trains across a level crossing at a greater

(*o*) *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763 [C. A.].

(*p*) See *per* COLERIDGE, L.C.J., in *Bonnard* v. *Perryman*, [1891] 2 Ch. 269 [C. A.], at p. 283.

(*q*) *Hermann Loog* v. *Bean*, 26 Ch. D. 306 [C. A.].

(*r*) 3 T. L. R. 846 [C. A.].

(*s*) 4 K. & J. 528. But *cf.* Illust. (5), p. 89, *supra*.

Art. 42.

speed than four miles an hour, it was held that they must be restrained by injunction at the suit of the Attorney-General, from running trains at a greater speed than four miles an hour, and that the court could not entertain the question whether the infringement of the statute caused any inconvenience to the public (*t*).

(*t*) *Att.-Gen.* v. *London and North Western Rail. Co.*, [1900] 1 Q. B. 78 [C. A.].

CHAPTER X.

OF THE LIMITATION OF ACTIONS FOR TORT.

SECTION I.—THE STATUTES OF LIMITATIONS.

ART. 43.—*The Principal Periods of Limitation.*

Every action for tort must be brought within **six years** from the time when the cause of action is complete (*a*), except—

(a) Trespass to the person by assault or false imprisonment—within **four years** (*b*).

(b) Slander—within **two years** (*c*).

(c) Actions under Lord Campbell's Act—within **one year** from the death of the deceased (*d*).

(d) Actions under the Employers' Liability Act within **six months**, or (if injured person killed) within **one year** of the death (*e*).

(e) Actions for recovery of land—within **twelve years** (*f*).

(*a*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.
(*b*) *Ibid.*
(*c*) *Ibid.*
(*d*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93). See Art. 33.
(*e*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4. See Art. 94.
(*f*) See Arts. 134 and 135, where the rule is more fully stated.

Art. 44.

ART. 44.—*Commencement of Period.*

(1) If the cause of action is the doing of a thing, the action must be brought within the prescribed period after the actual doing of the thing complained of.

(2) But if the cause of action is not the doing of something but the damage resulting therefrom the period of limitation is to be computed from the time when the party sustained the damage (*g*).

(3) And where a tort has been fraudulently concealed by the defendant, and the plaintiff has had no reasonable means of discovering it, the statute only runs from the date of the discovery (*h*).

Explanation.

The meaning of this rule is, that where the tort is the wrongful infringement of a right, the period of limitation runs immediately from the date of the infringement. But, on the other hand, where the tort consists in the violation of a duty coupled with actual resulting damage, then, as the breach of duty is not of itself a tort, so the period of limitation does not commence to run until it becomes a tort by reason of the actual damage resulting from it.

Concealed fraud.

The doctrine of "concealed fraud" is an equitable doctrine. It only applies where the tort has been fraudulently concealed **by the person setting up the statute**, or by someone through whom he claims. It would be inequitable to allow a person to take advantage of his own fraud by pleading the statute when that fraud had taken from the plaintiff the chance of bringing his action earlier (*i*).

(*g*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127.

(*h*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351 [P. C.].

(*i*) See *Thorne* v. *Heard*, [1894] 1 Ch. 599 [C. A.]; affirmed, [1895] A. C. 495.

Art. 44.

Illustrations.

Taking away lateral support.

(1) Where A. owned houses built upon land contiguous to land of B., C., and D.; and E., being the owner of the mines under the land of all these persons, so worked them that the lands of B. sank, and after more than six years' interval (the period of limitation in actions for causing subsidence), their sinking caused an injury to A.'s houses: —*Held*, that A.'s right of action was not barred, as the tort to him was the subsidence caused by the working of the mines, and not the working itself (*k*). And so, too, each fresh subsidence is a new cause of action for which a fresh action can be brought within six years of such subsidence (*l*).

Abstracting coal.

(2) But where a trespasser wrongfully worked *the plaintiff's coal*, in consequence of which the surface of the plaintiff's land subsided, it was held that the statute commenced to run from the working and taking away of the plaintiff's coal, and not from the subsidence; on the ground that the working of the coal was a complete tort, and that the subsidence was only a consequence of it (*m*).

Actions for recovery of chattels.

(3) A lease, belonging to the plaintiff, was fraudulently taken from him by his son, and deposited with B. to secure a loan made by B. to the plaintiff's son. The plaintiff was ignorant of this transaction. Subsequently B. became bankrupt, and his trustee in bankruptcy assigned the leasehold premises to the defendant. B. and the defendant were both ignorant of the fraud. The plaintiff then demanded the lease of the defendant, and upon his refusal began an action for wrongful detention and conversion of the lease; to which the defendant pleaded that the fraudulent deposit with B. was made more than six years before action brought, and that, consequently, the action was barred by the Statute of Limitations. The Court of Appeal, however, held that the statute only began to run when the plaintiff had a complete cause of action against the defendant, *i.e.*, *when he demanded the deed and was refused it*, and not from the receipt of

(*k*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503.

(*l*) *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127.

(*m*) *Spoor* v. *Green*, L. R. 9 Ex. 99.

Art. 44.

the deed by B. In giving judgment, Lord ESHER, M.R., said: "I am of opinion that, in the present case, the Statute of Limitations does not apply; it applies only to an action brought against the defendant in respect of a wrongful act done by the defendant himself. The property in chattels, which are the subject-matter of this action, is not changed by the Statute of Limitations, though more than six years may elapse, and if the rightful owner recovers them, the other man cannot maintain an action against him in respect of them" (*n*).

Actions for recovery of land.

(4) There is a great distinction between actions for the recovery of chattels and actions for the recovery of land. For the **Statutes of Limitations do not bar the right to chattels** after the prescribed period, but **only bar the plaintiff's remedy** against the wrongdoer; whereas the **Real Property Limitation Acts bar and extinguish not merely the remedy but also the right** (*o*). Consequently, if a plaintiff has allowed another to remain in possession of land, without acknowledgment, for twelve years, he will be barred, although he may never have demanded delivery up of possession (*p*). Where, however, an intruder goes out of possession of land before acquiring a statutory title the statute ceases to run, and the title of the true owner remains unaffected, even although he does not himself retake possession until after the expiration of the statutory period (*q*).

ART. 45.—*Continuing Torts.*

Where the tort is continuing, or recurs, a fresh right of action arises on each occasion (*r*).

Illustrations.

False imprisonment.

(1) Thus, where an action is brought against a person for false imprisonment, every continuance of the imprisonment

(*n*) *Miller* v. *Dell*, [1891] 1 Q. B. 468 [C. A.]; and see also *Spackman* v. *Foster*, 11 Q. B. D. 99.

(*o*) See 3 & 4 Will. 4, c. 27, s. 34, and 37 & 38 Vict. c. 57, s. 9.

(*p*) See *Scott* v. *Nixon*, 3 Dru. & War. 388; *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 89; and *Moulton* v. *Edmonds*, 1 De G. F. & J. 246.

(*q*) *Agency Co.* v. *Short*, 13 App. Cas. 793; 59 L. T. 677 [P. C.].

(*r*) *Whitehouse* v. *Fellowes*, 10 C. B. (N.S.) 765.

de die in diem is a new imprisonment; and therefore the period of limitation commences to run from the last, and not the first day of the imprisonment (*s*). Art. 45.

(2) But where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of B.'s rights, a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass. The fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrongdoer and liable to repeated actions as long as the ditch remains unfilled, even though there afterwards arises new and unforeseen damage from the existence of the ditch (*t*). Trespass.

(3) But where the defendants (a highway authority) maintained and kept a ditch so as to be a nuisance, it was held that there was a continuing wrongful act in so keeping it, and that the period of limitation did not run from the first making of it (*u*). Nuisance.

ART. 46.—*Disability.*

Where a person is under disability, the statute only runs from the cesser of the disability (*x*). But whenever the statute once begins to run, it continues to do so notwithstanding subsequent disability (*y*).

By disability is meant infancy, lunacy, or idiocy, and formerly coverture; but since the Married Women's Property Act, 1882, was passed, the latter is no longer disability.

(*s*) *Hardy* v. *Ryle*, 39 B. & C. 608.
(*t*) *Kansas Pacific Railway* v. *Mihlman*, 17 Kansas Reports, 224.
(*u*) *Whitehouse* v. *Fellowes*, 10 C. B. (N.S.) 765.
(*x*) 21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 27, s. 16.
(*y*) *Rhodes* v. *Smethurst*, 4 M. & W. 42; *Lafond* v. *Ruddock*, 13 C. B. 819.

Art. 47.

SECTION II.—PUBLIC AUTHORITIES PROTECTION ACT, 1893.

ART. 47.—*Special limitation in favour of Public Officers and Authorities.*

No action lies against any person:

(a) For any act done in pursuance or execution, or intended execution, of any Act of Parliament or of any public duty or authority, or

(b) In respect of any neglect or default in the execution of any Act of Parliament, duty or authority,

unless it be commenced within **six months** next after the act, neglect or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof (*a*).

Continuance of damage.

The period of six months runs from the act, neglect or default complained of: *or* "in case of a **continuance of injury or damage,**" from the ceasing thereof. These words have been held to apply not to cases where damage inflicted once and for all continues unrepaired, but to cases where there is a new damage recurring day by day in respect of an act done, it may be once and for all at some prior time, or repeated, it may be from day to day. For instance, where a local authority discharges sewage day by day into a private lake, that is a "continuance of injury or damage" in respect of which an action lies, although it may have *begun* more than six months before action brought (*b*).

Illustrations.

(1) A magistrate having convicted and fined the plaintiff for an offence under the Vaccination Acts, issued a distress warrant in default of payment of the fine, and a distress

(*a*) 56 & 57 Vict. c. 61.

(*b*) *Harrington* (*Earl of*) v. *Derby Corporation*, [1905] 1 Ch. 205, 225.

Art. 47.

was put in on the plaintiff's premises. Subsequently the conviction was quashed for want of jurisdiction. The plaintiff has six months *from the date of the wrongful entry* on his premises within which to bring his action for the illegal distress. The wrongful entry, not the order of the magistrate, by authority of which it was made, was "the act complained of" (*c*).

(2) A municipal corporation acquired and worked tramways under their statutory powers. An action for damages for injuries sustained by a passenger on one of their tramcars in consequence of the negligence of their servants must be begun within six months of the negligence complained of (*d*).

Contractor under public authority

(3) But, though the protection of the Act extends to the officers of a public body and to persons acting under their direct mandate, it does not extend to an independent contractor doing work under contract with a public authority for his own profit. So a contractor laying down tram lines under contract with the London County Council (though the county council would be protected) cannot claim the protection of the Act (*e*).

(4) An action was brought against a district board having the control and management of a hospital, for negligence of a nurse, whereby a patient lost his life through being given an overdose of opium. The action was brought by the widow of the patient under Lord Campbell's Act. Under that Act the action must be brought within one year of the death. But it was held that the Public Authorities Protection Act applied, and as the action was not brought within six months of the negligence complained of it was too late (*f*).

(*c*) *Polley* v. *Fordham*, [1904] 2 K. B. 345.

(*d*) *Lyles* v. *Southend Corporation*, [1905] 2 K. B. 1 [C. A.].

(*e*) *Tilling* v. *Dick, Kerr & Co.*, [1905] 1 K. B. 562.

(*f*) *Markey* v. *Tolworth Joint Isolation Hospital Board*, [1900] 2 Q. B. 454; and see *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804 [C. A.].

PART II.

RULES RELATING TO PARTICULAR TORTS.

CHAPTER I.

OF DEFAMATION.

Art. 48.—*Definitions.*

(1) **Defamation** is the publication of and concerning a person of defamatory words or of a defamatory picture, etc.

(2) A **libel** for which an action will lie is a statement **in writing** (or in print or in the form of a picture, or caricature) published without lawful justification or excuse calculated to convey to those to whom it is published an imputation on the plaintiff injurious to him in his trade or holding him up to hatred, contempt or ridicule (*a*).

(3) **Slander** is an **oral** statement published without lawful justification or excuse calculated to convey to those to whom it is published an imputation on the plaintiff injurious to him in his trade or holding him up to hatred, contempt, or ridicule.

No action will lie for **slander** unless either (a) the plaintiff prove **special damage**, or (b) the slander is calculated to convey an imputation of one of the kinds enumerated in Art. 50.

Analysis of libel.

The three elements necessary to constitute actionable libel are—

(1) that the words, etc., complained of are defamatory;

(*a*) *Per* Lord Blackburn, *Capital and Counties Bank* v. *Henty*, in 7 App. Cas. 741, at p. 771.

Art. 48.

(2) that they refer to the plaintiff;

(3) that they were published by the defendant.

If the plaintiff establishes these three points, he makes out a primâ facie case.

Analysis of slander.

If the action is for **slander**, he must also prove special damage, unless the slander imputes a criminal offence, or reflects on the plaintiff in the way of his trade or profession, etc. See Art. 50.

Justification.

By proving these points, however, the plaintiff only establishes a primâ facie case, and in answer to it the defendant is entitled to prove that the publication was **justified**. He may always justify by showing that the statement complained of was **true**. That is always a complete justification. Proving the truth is generally called "justifying." The defendant may also prove that the publication was privileged, that is, that the occasion of publication was such that he was justified in publishing the words whether true or not. See Arts. 56 and 57.

ART. 49.—*What is defamatory.*

(1) Defamatory words or pictures or effigies are such as impute conduct or qualities tending to disparage or degrade the plaintiff (*b*); or to expose him to contempt, ridicule, or public hatred; or to prejudice his private character or credit (*c*); or to cause him to be feared or avoided (*d*).

Provided that words published of a corporation are not actionable without proof of special damage if they refer only to personal character

(*b*) *Digby* v. *Thompson*, 4 B. & Ad. 821.

(*c*) *Fray* v. *Fray*, 34 L. J. C. P. 45.

(*d*) *J'Anson* v. *Stuart*, 1 Term Rep. 748; *Walker* v. *Brogden*, 19 C. B. (N.S.) 65.

Art. 49.

or reputation; but words calculated to affect a corporation in its property or business may be actionable without proof of special damage (*e*).

(2) It is for the court to say whether the words complained of are capable of bearing a defamatory meaning, and for the jury to say whether they in fact bear that meaning (*f*).

(3) The words used must (if nothing is alleged to give them an extended sense) be construed in the sense in which they would be understood by ordinary persons. If they are not capable of a defamatory meaning in that sense they may nevertheless be actionable if it is proved that they would be defamatory in the sense in which they would be understood by the persons to whom they were published (*f*).

(4) It is immaterial whether or not the defendant meant the words to be defamatory. The question is whether the words he used were calculated to convey a disparaging imputation (*g*).

Note.—Words which are not defamatory in their ordinary sense may, nevertheless, convey a defamatory meaning owing to the circumstances in which they are spoken. If I say of a man "he is no better than his father," these words are not in their ordinary sense capable of a defamatory meaning. But if the father is known by the persons to whom the words are used to have been a scoundrel, the words used would convey to them the meaning that the son also is a scoundrel. The words then would be defamatory in the sense in which they were understood by the persons to whom they were addressed.

(*e*) *South Hetton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B. 133; *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94.

(*f*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

(*g*) *Per* Lord Blackburn in *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, at p. 772; *per* Lord Loreburn in *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20, at p. 23.

Art. 49.

As Lord BLACKBURN says: "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances" (*h*).

Innuendo.

Accordingly, to make out a case when **words not defamatory in their ordinary sense** have been used, the plaintiff must allege and prove an **innuendo**, *i.e.*, he must allege and prove what the words meant to the persons to whom they were used. So in the illustration we have taken, he would allege that the words used meant "that the plaintiff was a scoundrel." He will prove this meaning by showing by evidence that the father was a scoundrel, and that the person using the words and the person to whom they were addressed knew that the father was a scoundrel.

Hence the rule that **whenever the words are not defamatory in their ordinary sense, the plaintiff must allege in his statement of claim an innuendo, and must prove the facts necessary to satisfy the jury that the meaning alleged in the innuendo was the meaning of the words.** But when words are **defamatory in their ordinary** sense, **no innuendo is necessary.** It is for the court to say whether, taking into account the manner and occasion of the publication and all the circumstances, the words are capable of bearing the meaning alleged in the innuendo, and for the jury to say whether in fact they bore that meaning.

Illustrations of words defamatory in their ordinary sense.

(1) Thus, describing another as an infernal villain is a disparaging statement sufficient to sustain an action (*i*); and so is an imputation of insanity (*k*); or insolvency, or impecuniousness (*l*); or even of past impecuniousness (*m*);

(*h*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 771.

(*i*) *Bell* v. *Stone*, 1 Bos. & P. 331.

(*k*) *Morgan* v. *Lingen*, 8 L. T. 800.

(*l*) *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 28 L. J. Ex. 201; *Eaton* v. *Johns*, 1 Dowl. (N.S.) 602.

(*m*) *Cox* v. *Lee*, L. R. 4 Ex. 284.

Art. 49.

or of gross misconduct (*n*); or of turf-trickery (*o*); or of ingratitude (*p*).

(2) So, reflections on the professional and commercial conduct of another are defamatory; as, for instance, to say of a physician that he is a quack. So, also, calling a newspaper proprietor "a libellous journalist" is defamatory (*q*); although it would appear that applying the word "Ananias" to a newspaper does not necessarily impute wilful and deliberate falsehood to its manager and proprietor (*r*).

Words defamatory by innuendo.

(3) Inserting the plaintiffs' names under the head of "first meetings under the Bankruptcy Act" is libellous, the innuendo being that the plaintiffs had become bankrupt, or taken proceedings in liquidation (*s*).

Words not defamatory in their ordinary sense.

(4) When a firm of brewers sent out to their customers a circular in the following terms: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank," it was held that (1) the words were not libellous in their natural meaning, and (2) there were no facts proved which made them capable of bearing the meaning alleged in the innuendo to the effect that the plaintiffs were insolvent. Accordingly, the circular was not actionable although its effect had been to cause a run on the bank and loss to the plaintiffs (*t*).

(5) And in a later case it was held that a circular sent out by an insurance company for which the plaintiff had acted as agent, to the effect that the agency of the plaintiff had "been closed by the directors," was incapable of meaning that the plaintiff had been dismissed for some reason discreditable to him (as alleged in the innuendo),

(*n*) *Clement* v. *Chivis*, 9 B. & C. 172.
(*o*) *Greville* v. *Chapman*, 5 Q. B. 731, at p. 744.
(*p*) *Cox* v. *Lee*, L. R. 4 Ex. 284.
(*q*) *Wakley* v. *Cooke*, 4 Ex. 518.
(*r*) *Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284.
(*s*) *Shepheard* v. *Whitaker*, L. R. 10 C. P. 502.
(*t*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

Art. 49. although some persons might choose to draw this inference, not from the language used, but from the fact referred to (*u*).

Corporations. (6) It is actionable without special damage to say of a colliery company that the cottages let by the proprietors to their workmen are in an insanitary condition, for such an imputation is likely to injure its reputation in the way of its business (*x*). But inasmuch as a corporation, as distinguished from the individuals composing it, cannot be guilty of corrupt practices, it is not libellous without proof of special damage to charge a municipal corporation with corrupt practices (*y*).

Effigy. (7) The exhibition of the waxen effigy of a person who has been tried for a murder and acquitted, in company with the effigies of notorious criminals, may be defamatory (*z*).

ART. 50.—*When Special Damage essential to Action for Slander.*

(1) Except in the following cases spoken words are not actionable without proof of special damage, and the damage complained of must be such as might fairly and reasonably have been anticipated from the slander (*a*).

(2) No proof of special damage need be given in the case of words imputing:

(a) A criminal offence punishable by imprisonment (*b*);

(*u*) *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68.

(*x*) *South Hetton Coal Co., Limited* v. *North Eastern News Association*, [1894] 1 Q. B. 133 [C. A.].

(*y*) *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94.

(*z*) *Monson* v. *Tussaud's, Limited*, *Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 672 [C. A.].

(*a*) *Lynch* v. *Knight*, 9 H. L. Cas. 577.

(*b*) *Webb* v. *Beavan*, 11 Q. B. D. 609; *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609.

Art. 50.

(b) Some disease tending to exclude the party defamed from society (*c*).

(c) Unchastity in a female (*d*);

(d) Unfitness of the plaintiff for his profession or trade, or office of profit (*e*);

(e) Dishonesty or malversation in a public office of trust (*f*); or

(f) Misconduct in an office of credit or honour such as would be ground for his removal from office (*g*).

Damage must be natural, but not necessarily legal, consequence of slander

(1) The special damage to support an action for slander must be the **natural and probable consequence** of the defendant's words (*h*), but need **not be their legal consequence**, *i.e.*, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what *ought* to follow (*i*).

The special damage must be some temporal loss.

(2) The special damage must be actual temporal loss (*k*), *i.e.*, loss of something pecuniary or capable of being estimated in money (*l*), mere *risk of loss* is not enough (*m*). Thus actual loss of trade or employment is enough (*n*), as also is actual loss of gratuitous hospitality (*o*), for a dinner has some pecuniary value; but loss of friends or society, pain, illness and suffering, are not enough (*p*).

(*c*) *Bloodworth* v. *Gray*, 7 Man. & Gr. 334.
(*d*) Slander of Women Act, 1891.
(*e*) *Foulger* v. *Newcomb*, L. R. 2 Ex. 327.
(*f*) *Booth* v. *Arnold*, [1895] 1 Q. B. 571 [C. A.].
(*g*) *Onslow* v. *Horne*, 2 W. Bl. 750.
(*h*) *Lynch* v. *Knight*, 9 H. L. Cas. 577; *Chamberlain* v. *Boyd*, 11 Q. B. D. 407 [C. A.].
(*i*) *Lynch* v. *Knight*, 9 H. L. Cas. 577.
(*k*) *Per* BOWEN, L.J., in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524 [C. A.], at p. 532.
(*l*) *Chamberlain* v. *Boyd*, 11 Q. B. D. 407.
(*m*) *Ibid.*, *per* BOWEN, L.J., at p. 416.
(*n*) *Evans* v. *Harries*, 1 H. & N. 251.
(*o*) *Davies* v. *Solomon*, L. R. 7 Q. B. 112.
(*p*) *Moore* v. *Meagher*, 1 Taunt. 39 [Ex. Ch.]; *Roberts* v. *Roberts*, 5 B. & S. 384; *Allsop* v. *Allsop*, 5 H. & N. 534.

Art. 50.

Damage caused by plaintiff himself.

(3) If the damage be immediately caused by the plaintiff himself, he cannot sue. For instance, where the plaintiff (a young woman) told the slander to her betrothed, who consequently refused to marry her, it was held that no action would lie against the slanderer (*q*).

Imputation of unchastity.

(4) Formerly, words imputing unchastity to a woman were not actionable without proof of special damage except in the city of London. But by the Slander of Women Act, 1891 (*r*), this scandalous state of the law has been altered, and it is enacted that words spoken and published which impute unchastity or adultery to any woman or girl, shall not require special damage to render them actionable: provided that the plaintiff shall not recover more costs than damages, unless the judge certifies that there was reasonable cause for bringing the action.

Examples of damage implied from imputation of crime.

(5) The words, "You are a rogue, and I will prove you a rogue, for you forged my name," are actionable *per se* (*s*). And it is immaterial that the charge was made at a time when it could not cause any criminal proceedings to be instituted. Thus the words "You are guilty" [innuendo "of the murder of D."] are a sufficient charge of murder to support an action without proof of special damage (*t*). But if words charging a crime are accompanied by an express allusion to a transaction which merely amounts to a civil injury, as breach of trust or contract, they are not actionable (*u*). Nor are words imputing an impossible crime, as "Thou hast killed my wife," who, to the knowledge of all parties, was alive at the time (*x*).

(6) The allegation, too, must be a direct charge of a crime punishable by imprisonment. The crime need not be indictable (*y*), but a charge of having committed a crime punishable by fine only, although it involves a liability to summary arrest, is insufficient, without proof of special

(*q*) *Speight* v. *Gosnay*, 60 L. J. Q. B. 231 [C. A.].
(*r*) 54 & 55 Vict. c. 51.
(*s*) *Jones* v. *Herne*, 2 Wils. 87.
(*t*) *Oldham* v. *Peake*, W. Bl. 959.
(*u*) *Per* Lord ELLENBOROUGH in *Thompson* v. *Bernard*, 1 Camp. 48; and *per* Lord KENYON, *Christie* v. *Cowell*, Peake, 4.
(*x*) *Snag* v. *Gee*, 4 Co. Rep. 16; *Heming* v. *Power*, 10 M. & W. 564, 569.
(*y*) *Webb* v. *Beavan*, 11 Q. B. D. 609.

Art. 50.

damage (*a*). Thus, saying of another that he had forsworn himself is not actionable *per se*, without showing that the words had reference to some judicial inquiry (*b*). But an imputation that the plaintiff had brought a blackmailing action is actionable without proof of special damage, for by inference it imputed to the plaintiff that he was guilty of an indictable offence (*c*).

(7) So words imputing mere suspicion of a crime are not actionable without proof of special damage (*d*).

Imputation of unfitness for society.

(8) Again, to allege the *present* possession of an infectious, or even a venereal, disease is actionable, but a charge of past infection is not; for it shows no present unfitness for society (*e*).

Imputation of unfitness for business or office of profit.

(9) It is quite clear that, as regards a man's business, or profession, or office, *if it be an office of profit*, the mere imputation of want of ability to discharge the duties of that office, is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct; the probability of pecuniary loss from such imputation obviates the necessity of proving special damage. But the mere disparagement of a tradesman's goods is not sufficient. The disparagement must be of his unfitness for business (*f*), or some allegation which must necessarily injure his business (*g*). Thus, words imputing drunkenness to a master mariner whilst in command of a ship at sea are actionable *per se* (*h*). And similarly where a clergyman is beneficed or holds some ecclesiastical office, a charge of incontinence is actionable; but it is not so if he holds no ecclesiastical office (*i*).

(*a*) *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609.
(*b*) *Holt* v. *Scholefield*, 6 Term Rep. 691.
(*c*) *Marks* v. *Samuel*, [1904] 2 K. B. 287 [C. A.].
(*d*) *Simmons* v. *Mitchell*, 6 App. Cas. 156 [P. C.].
(*e*) See *Carslake* v. *Mappledoram*, 2 Term Rep. 473; *Bloodworth* v. *Gray*, 7 Man. & Gr. 334.
(*f*) See *White* v. *Mellin*, [1895] A. C. 154.
(*g*) See *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 15 R. P. C. 677.
(*h*) *Irwin* v. *Brandwood*, 2 H. & C. 960.
(*i*) *Gallwey* v. *Marshall*, 23 L. J. Ex. 78.

Art. 50.

(10) So to say of a surgeon "he is a bad character; none of the men here will meet him," is actionable (*k*). Or of an attorney that "he deserves to be struck off the roll" (*l*). But without special damage it is not actionable to impute to a solicitor insolvency (*m*), or to say "he has defrauded his creditors, and been horsewhipped off the course at Doncaster," because this has no reference to his profession (*n*). But this seems a curious refinement. A similarly absurd distinction has been taken between saying of a barrister "He hath as much law as a jackanapes" (which is actionable *per se*) and "He hath no more wit than a jackanapes" (which is not actionable). The point being that law is, but wit is not, essential in the profession of a counsellor (*o*).

Unfitness for offices of honour and credit.

(11) With regard to slander upon persons holding mere offices of honour, the loss of which would not necessarily involve a pecuniary loss, the mere imputation of want of ability or capacity is not enough. The imputation to be actionable *per se*, must be one which, if true, would show **that the plaintiff ought to be and could be deprived of his office by reason of the incapacity imputed to him.** The implied damage is the risk of loss of the office which he holds. Thus, an imputation of drunkenness against a town councillor is not actionable without proof of special damage. For such conduct, however objectionable, is not such as would enable him to be removed from, or deprived of that office, nor is it a charge of malversation in his office (*p*). But a charge of **dishonesty in his office**, against one who holds a public office of trust, such as that of an alderman of a borough, is actionable without special damage, even although there be no power to remove him (*q*).

(*k*) *Southee* v. *Denny*, 1 Ex. 196.
(*l*) *Phillips* v. *Jansen*, 2 Esp. 624.
(*m*) *Dauncey* v. *Holloway*, [1901] 2 K. B. 441 [C. A.].
(*n*) See also *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; and *Miller* v. *David*, L. R. 9 C. P. 118.
(*o*) See *per* POLLOCK *arguendo*, *Ayre* v. *Craven*, 2 A. & E. 2, at p. 4.
(*p*) *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797 [C. A.].
(*q*) *Booth* v. *Arnold*, [1895] 1 Q. B. 571 [C. A.].

ART. 51.—*The Libel or Slander must refer to the Plaintiff.* Art. 51.

The plaintiff must prove that the words complained of might reasonably be understood by the persons to whom they are published to refer to him.

It is no defence that the defendant did not intend to refer to the plaintiff (*qq*).

Comment. It is not necessary that the plaintiff should be referred to by name. A person may be libelled under a fictitious name or by mere description. But there must be enough to show ordinary readers that the plaintiff is the person about whom the defamatory words are used. So "if a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual" (*r*).

On the other hand, when the words used are such as to indicate a particular person, he can sue even though the defendant did not know of his existence and did not intend to defame him (*qq*).

Illustrations. (1) So where an article in a newspaper described certain sales of forged antiques as an attempt at deception and extortion, but did not refer to any particular dealer by name or description, it was held that no dealer could sue for libel, as the libel attacked not an individual but a class (*s*).

(2) A newspaper published an article describing a motor festival at Dieppe. The article contained the words: "Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know, the other thing, etc.," and went on to say that Artemus Jones was a churchwarden when at home, but that when on the French side of the Channel "he is the life and soul of a gay little band

(*qq*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.
(*r*) *Per* WILLES, J., in *Eastwood* v. *Holmes*, 1 F. & F. 349.
(*s*) *Eastwood* v. *Holmes*, *supra*.

Art. 51. that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies." Neither the writer nor the editor of the paper intended to refer to the plaintiff, a well-known barrister named Artemus Jones. The sketch was a mere fancy sketch of life abroad, and the name "Artemus Jones" was used as a fancy name, describing an imaginary character. It was proved, however, that readers of the paper thought the article referred to Mr. Jones. The judge directed the jury that if persons reading the article might reasonably think it related to the plaintiff, they might find a verdict for him. The jury found for the plaintiff, and the House of Lords held that he was entitled to judgment (*t*).

ART. 52.—*Publication.*

The making known of a libel or slander **to any person other than the object of it,** is publication in its legal sense.

Publication explained.

(1) "Though, in common parlance, that word [publication] may be confined to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual is indisputably, in law, a publishing" (*u*). Publication, therefore, being a question of law, it is for the jury to find whether the facts by which it is endeavoured to prove publication are true; but for the court to decide whether those facts constitute a publication in point of law (*v*).

Telegrams and post cards.

(2) If the libel be contained in a telegram, or be written on a post card, that is publication, even though they be addressed to the party libelled; because the telegram must be read by the transmitting and receiving officials, and the

(*t*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.
(*u*) *R.* v. *Burdett*, 4 B. & Ald. 143.
(*v*) *Street* v. *Licensed Victuallers' Society*, 22 W. R. 553; *Hart* v. *Wall*, 2 C. P. D. 146.

post card will in all probability be read by some person in the course of transmission (*w*), unless the statement on the post card is of such a nature that it would not be understood as defamatory by persons reading it casually (*x*). Art. 52.

(3) So, dictating a libellous letter to a typewriter, and giving it to an office boy to make a press copy, is publication (*y*). Dictating libel.

(4) The communication of a libel *by the writer to his own wife* is not "publication," because, in the eye of the law, husband and wife are one person (*z*). Husband and wife.

But communication *to the wife of the person defamed* is "publication." Obviously, a man may suffer grievously if imputations on his character are made to his wife (*a*).

ART. 53.—*Repeating Libel or Slander.*

(1) Whenever an action will lie for slander or libel, it is of no consequence that the defendant was not the originator, but merely a repeater, or printer and publisher of it (*b*).

(2) But in slander, if the special damage arise simply from the repetition, the originator will not be liable (*c*); except (a) where the originator has authorised the repetition (*d*); or (b) where the words are originally spoken to a person who

(*w*) *Williamson* v. *Freer*, L. R. 9 C. P. 393.

(*x*) *Sadgrove* v. *Hole*, [1901] 2 K. B. 1.

(*y*) *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524 (unless the circumstances are such that the occasion is privileged; see *Edmondson* v. *Birch*, [1907] 1 K. B. 371, *post*, p. 127.

(*z*) *Wennhak* v. *Morgan*, 20 Q. B. D. 635.

(*a*) *Wenman* v. *Ash*, 13 C. B. 836.

(*b*) *McPherson* v. *Daniels*, 10 B. & C. 263; *Watkin* v. *Hall*, L. R. 3 Q. B. 396.

(*c*) *Parkins* v. *Scott*, 1 H. & C. 153.

(*d*) *Kendillon* v. *Maltby*, Car. & M. 402.

Art. 53. is under a moral obligation to communicate them to a third person (*e*).

Example. (1) But where A. slandered B. in C.'s hearing, and C., without authority, repeated the slander to D., *per quod* D. refused to trust B.: it was held that no action lay against A., the original utterer, as the damage was the result of C.'s unauthorised repetition and not of the original statement (*f*).

Printing slander. (2) So the printing and publishing by a third party of oral slander (not *per se* actionable) renders the person who prints, or writes and publishes the slander, and all aiding or assisting him, liable to an action for libel, although the originator, who merely *spoke* the slander, will not be liable (*g*).

Duty to repeat. (3) In *Derry* v. *Handley* (*e*), COCKBURN, C.J., observed: "Where an actual duty is cast upon the person to whom the slander is uttered to communicate what he has heard to some third person (as when a communication is made to a husband, such as, if true, would render the person the subject of it unfit to associate with his wife and daughters), the slanderer cannot excuse himself by saying, 'True, I told the husband, but I never intended that he should carry the matter to his wife.' In such case the communication is privileged, and an exception to the rule to which I have referred; and the originator of the slander, and not the bearer of it, is responsible for the consequences."

Publisher of libel. (4) Upon this principle the publisher, as well as the author of a libel, is liable; and the former cannot exonerate himself by naming the latter. For "of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not" (*h*).

(*e*) *Derry* v. *Handley*, 16 L. T. (N.S.) 263.
(*f*) *Ward* v. *Weeks*, 4 Moo. & P. 808.
(*g*) *McGregor* v. *Thwaites*, 3 B. & C. 24.
(*h*) *Per* BEST, J., *De Crespigny* v. *Wellesley*, 5 Bing. 403.

Art. 53.

Libels in newspapers.

(5) When a libel is published in a newspaper the original composer is liable, for not only does he publish it to the editor and compositors, but he is a participator in the publication to the public. The proprietor who publishes the newspaper by his servants, is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. The editor also is usually responsible for the publication (*i*). And, of course the same principle applies to libels in magazines and books.

Innocent disseminators.

(6) A more difficult question arises with regard to the dissemination of newspapers and books by newsvendors, booksellers, and lending libraries. Primâ facie all these persons take part in publishing libels contained in the papers or books they sell. But a person who merely disseminates a newspaper or book which contains a libel is excused if he can satisfy the jury (i) that he **did not know** the newspaper or book **contained** a libel; and (ii) that his ignorance was **not due to any negligence** on his part; and (iii) that he **did not know**, and had no grounds for thinking, the book or newspaper was **likely to contain libellous matter.** If he can prove these facts he is not responsible as a publisher of the libel; otherwise he is (*k*).

ART. 54.—*Justification.*

That the statements complained of as defamatory are true in fact is an absolute defence in an action of defamation.

Proof of justification.

(1) The burden of proving a defence of justification lies on the defendant; and if justification be set up it must be strictly proved, and it is not enough to say that the statements are partly or in the main true. The plaintiff must

(*i*) *Per* Lord ESHER in *Emmens* v. *Pottle*, 16 Q. B. D. 354, 357.

(*k*) *Emmens* v. *Pottle*, 16 Q. B. D. 354; *Vizetelli* v. *Mudie's Select Library*, [1900] 2 Q. B. 170.

Art. 54.

prove that the facts alleged in justification are at any rate substantially true in every material particular. Nor is it enough to show that the plaintiff had a general reputation for the misconduct alleged. It must be proved that in fact he was guilty of the misconduct (*l*).

Explanation of justification.

(2) LITTLEDALE, J., thus explains the principle of the defence of justification: "If the defendant relies upon the truth as an answer to the action, he must plead that matter specially; not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to, possess" (*m*).

ART. 55.—*Fair Comment.*

(1) No action will lie if the defendant can prove that the words complained of are a fair and bonâ fide comment on a matter of public interest.

(2) The court decides (i) whether the matter commented on is one of public interest; (ii) whether there is evidence that any part of the words complained of go beyond the limits of fair comment.

(3) The jury, if the court is of opinion that there is some evidence that the comment is not fair, finds whether it is so or not.

(4) Matters of public interest include (*inter alia*) literary and dramatic works, political

(*l*) *Wood* v. *Durham*, 21 Q. B. D. 501.
(*m*) See *M'Pherson* v. *Daniels*, 10 B. & C. 263, at p. 272.

matters, and the public conduct of public men, but not their private conduct. Art. 55.

(1) The defence of fair comment must not be confounded with justification on the one hand, or privilege on the other. If a defendant justifies, he must prove that the *facts* stated in the libel are substantially true. If he succeeds, he makes out his defence; if he fails, he may, nevertheless, successfully contend that the statements are in the nature of comment on a matter of public interest. Fair comment not justification.

(2) If the alleged libel is a criticism of some such matter of public interest, as a literary or dramatic work, and the statements are in the nature of comment, the defendant need not make out that they are just; it is enough if he can satisfy the jury that they are fair and honest. Thus, if a critic states of a play that it is "dull, vulgar and degraded," and relies on the defence of fair comment, he will succeed if this is an expression of honest opinion, even though the comment be not such as a jury might think a just or reasonable appreciation of the play (*n*). Literary criticism.

But the expressions used must not pass the limits of criticism. Facts are not comment; and if facts are misstated, the defence of fair comment is of no avail, as when in criticising a play, the critic stated it was founded on adultery, when in fact there was no incident of adultery in it. This cannot be "comment," fair or otherwise (*o*).

So, too, criticism of a literary work must not be used as a cloak for mere invective or personal imputations not arising out of the subject-matter or based on fact. Statements of this kind are not comment on a literary work, and are libellous if they are defamatory and not true (*o*).

Under these principles, not only books and works of art, but even tradesmen's advertisements, may be fairly criticised (*p*).

(3) When, however, the defence of fair comment is set up to an attack on the **conduct of public men**, the line is Attacks on public men

(*n*) *McQuire* v. *Western Morning News*, [1903] 2 K. B. 100.
(*o*) *Merivale* v. *Carson*, 20 Q. B. D. 275.
(*p*) *Paris* v. *Levy*, 30 L. J. C. P. 11.

Art. 55.

drawn more closely. A public man may be attacked in his **public conduct**, but **not in his private conduct** (except in so far as it touches on his public conduct). And even in regard to his public conduct, if imputations are made which charge a public man with base and sordid motives or dishonesty in the discharge of his duties, the defence of fair comment will not avail unless it is based upon facts which are truly stated, and the facts warrant the imputation made, *i.e.*, the inference drawn from the facts is a reasonable inference from those facts (*q*).

Fair comment and privilege.

(4) On the other hand, fair comment must be distinguished from privilege. If the defence is privilege, and the privilege is established, the plaintiff fails however grossly untrue the libel may be, unless the defendant was actuated by express malice in making it. If (in the case of qualified privilege) there was express malice, the defence of privilege fails. In fair comment no question of malice arises. The only question is, "is the comment fair, or does it exceed the bounds of fair criticism?" (*r*).

Fair comment is outside the region of libel altogether, whereas a privileged communication is one which is libellous, but for which no action will lie, because it is made in circumstances which make it privileged (*r*).

ART. 56.—*Absolute Privilege.*

No action lies for a statement made upon an occasion which is **absolutely privileged**, although made maliciously. Judicial, Parliamentary and State proceedings are occasions of absolute privilege.

NOTE.—CHANNELL, J. (*s*), thus explains the nature of the absolute privilege in judicial proceedings. "There is no

(*q*) *Campbell* v. *Spottiswoode*, 3 B. & S. 769; *Hunt* v. *Star Newspaper Co.*, [1908] 2 K. B. 309; *Dakhyl* v. *Labouchere*, [1908] 2 K. B. 325; *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292.

(*r*) See *per* BLACKBURN, J., in *Campbell* v. *Spottiswoode*, 3 B. & S. 769; *Merrivale* v. *Carson*, 20 Q. B. D. 275.

(*s*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584.

private right of a judge or a witness or an advocate to be malicious. It would be wrong of him, and *if it could be proved*, I am by no means sure that it would not be actionable. The real doctrine of what is called 'absolute privilege,' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants, should be perfectly free and independent, and to secure their independence that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious." Art. 56.

Absolute privilege. Parliamentary proceedings.

(1) Speeches in Parliament are absolutely and irrebuttably privileged (*t*); and a faithful report in a public newspaper of a debate of either House of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question (*u*). Statements of witnesses before Parliamentary Committees are also privileged (*x*). Communications relating to affairs of State made by one officer of State to another in the course of duty are also absolutely privileged (*y*).

(2) Reports, papers, votes and proceedings published by order of either House of Parliament, are absolutely privileged (*z*).

Judicial proceedings and matters of State.

(3) All judges, inferior as well as superior, are privileged for words spoken in the course of a judicial proceeding,

(*t*) *Stockdale* v. *Hansard*, 9 A. & E. 1; *Dillon* v. *Balfour*, 20 L. R. Ir. 601.

(*u*) *Wason* v. *Walter*, L. R. 4 Q. B. 73.

(*x*) *Goffin* v. *Donnelly*, 6 Q. B. D. 307.

(*y*) *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189.

(*z*) Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), ss. 1, 2.

Art. 56.

although they are spoken falsely and maliciously, and without reasonable or probable cause (*a*); and so are counsel, for words spoken with reference to and in the course of a judicial inquiry, although the words are irrelevant to any issue before the tribunal (*b*). Solicitors acting as advocates have a like privilege (*c*). The report of an Official Receiver made to the court in the winding up of a company is privileged on the same ground, as also is the annual report of the Inspector-General in Bankruptcy to the Board of Trade (*d*).

(4) Statements of witnesses made in the course of proceedings in a court of justice, or in any authorised tribunal acting judicially, or for the purpose of preparing proofs for use in such proceedings (*e*), can never be the subject of an action (*f*); and a military man giving evidence before a military court of inquiry which has not power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a court of justice (*g*). So also is a person who fills in a form required for obtaining a lunacy order (*h*).

Reports of legal proceedings.

(5) A *fair and accurate report in any newspaper* of proceedings publicly heard before any court exercising judicial authority, is privileged if (i) published contemporaneously with such proceedings, and (ii) not blasphemous or indecent (*i*).

(*a*) *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Law* v. *Llewellyn*, [1906] 1 K. B. 487.

(*b*) *Munster* v. *Lamb*, 11 Q. B. D. 588.

(*c*) *Ibid.*, and *Mackay* v. *Ford*, 29 L. J. Ex. 404.

(*d*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584; *Burr* v. *Smith*, [1909] 2 K. B. 306.

(*e*) *Watson* v. *M'Ewan*, [1905] A. C. 480.

(*f*) *Seaman* v. *Netherclift*, 2 C. P. D. 53; *Barratt* v. *Kearns*, [1905] 1 K. B. 504.

(*g*) *Dawkins* v. *Rokeby*, L. R. 7 H. L. 744.

(*h*) *Hodson* v. *Pare*, [1899] 1 Q. B. 455.

(*i*) 51 & 52 Vict. c. 64, s. 3 (Law of Libel Amendment Act, 1888). See also *post*, p. 127.

ART. 57.—*Qualified Privilege.* Art. 57.

(1) No action lies for a communication made upon an occasion of **qualified privilege** and fairly warranted by it, unless it be proved to have been made maliciously in fact (*k*).

(2) Communications are made upon occasions of qualified privilege if made by a person in discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. Such communications, if fairly warranted by any reasonable occasion or exigency and honestly made, are protected for the common convenience and welfare of society (*l*).

(3) It is the duty of the **judge** to determine **whether an occasion is privileged** or not, and if it is, and there is no evidence of actual malice to go to the jury, he must enter judgment for the defendant (*m*).

(4) It is for the **jury** to find **whether a communication** made upon a privileged occasion **is privileged** or not, *i.e.*, whether the communication is fairly warranted by the occasion and made without actual malice (*n*).

(5) If the occasion is privileged the onus is on the plaintiff to prove malice, *i.e.*, "actual malice" or "malice in fact" (*o*).

(*k*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341.

(*l*) See *Toogood* v. *Spyring*, 1 C. M. & R., p. 193; *Macintosh* v. *Dun*, [1908] A. C. 390, 398.

(*m*) *Clark* v. *Molyneux*, 3 Q. B. D., at p. 246.

(*n*) *Cooke* v. *Wildes*, 5 E. & B. 328; and *per* LOPES, L.J., in *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 529.

(*o*) *Clark* v. *Molyneux*, 3 Q. B. D. 237; *Jenoure* v. *Delmege*, [1891] A. C. 73.

Art. 57.

(6) A communication is made maliciously in fact if made from any indirect and wrong motive, such as anger or ill-will, or any unjustifiable intention to inflict injury on the person defamed; but if a person make a statement believing it to be true he will not lose the protection of the privileged occasion, although he have no reasonable grounds for his belief (*p*).

Comment.

(1) Lord BLACKBURN thus explains the nature of qualified privilege and malice: "A publication calculated to convey an actionable imputation is primâ facie a libel, the law as it is technically said, implying malice, or, as I should prefer to say, the law being that the person who so publishes is responsible for the natural consequences of his act. But if the occasion is such that there was either a **duty**, though perhaps only of imperfect obligation, or a **right** to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved; or I should prefer to say that he is not answerable for it so long as he is acting in compliance with that duty or exercising that right, and the burden of proof is on those who allege he was not so acting" (*q*).

Meaning of malice.

(2) "If," says BRETT, L.J., in *Clark* v. *Molyneux* (*r*), "the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. . . . Malice does not mean malice in law, a term of pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that

(*p*) *Clark* v. *Molyneux*, 3 Q. B. D. 237; *Royal Aquarium Society* v. *Parkinson*, [1892] 1 Q. B. 434.

(*q*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 787.

(*r*) 3 Q. B. D. 237, 246.

he did do a wrong thing from some wrong motive. So, if it be proved that out of anger or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive." Art. 57.

Social and moral duty.

(3) In *Stuart* v. *Bell* (*s*), the plaintiff was a valet, and whilst he and his master were staying at Newcastle as the guests of the defendant, who was a magistrate and mayor of Newcastle, the chief constable showed the defendant a letter which he had received from the Edinburgh police stating that the plaintiff was suspected of having committed a theft at a hotel in Edinburgh which he had recently left, and suggesting a cautious inquiry. The defendant, without making any inquiry, told the plaintiff's master privately that there had been a theft at the hotel and that suspicion had fallen on the plaintiff. It was held that the defendant made the statement to the plaintiff's master in discharge of a moral or social, though not a legal, duty, and that the occasion was privileged. There being no evidence of malice judgment was given for the defendant.

(4) So advice given in confidence, at the request of another and for his protection, is privileged; and it seems that the presence of a third party makes no difference (*t*). But it seems doubtful whether a volunteered statement is equally privileged (*u*). Thus the character of a servant given to a person requesting it, is privileged (*x*); and so, also, is the character of a person who states that she is a fit recipient of charity, given to, and at the request of, a person willing to bestow such charity, by the secretary of the Charity Organisation Society (*y*).

(*s*) [1891] 2 Q. B. 341.

(*t*) *Taylor* v. *Hawkins*, 16 Q. B. 308; *Clark* v. *Molyneux*, 3 Q. B. D. 237.

(*u*) *Coxhead* v. *Richards*, 15 L. J. C. P. 278; *Fryer* v. *Kinnersley*, 33 L. J. C. P. 96; but see *Davies* v. *Sneid*, L. R. 5 Q. B. 608.

(*x*) *Gardener* v. *Slade*, 18 L. J. Q. B. 334.

(*y*) *Waller* v. *Loch*, 7 Q. B. D. 619.

Art. 57.

(5) The character of a candidate for an office, given to one of his canvassers, was held to be privileged (*z*).

Statements made by one having an interest to one having a corresponding interest.

(6) A privileged occasion arises, if the communication is of such a nature that it can be fairly said that he who makes it has an interest in making it, and that those to whom it is made have a corresponding interest in having the communication made to them. Thus, where a railway company dismissed one of their guards on the ground that he had been guilty of gross neglect of duty, and published his name in a monthly circular addressed to their servants, stating the fact of, and the reason for, his dismissal, it was held that the statement was made on a privileged occasion, and that the defendants were not liable. For, as Lord ESHER, M.R., said: "Can any one doubt that a railway company, if they are of opinion that some of their servants have been doing things which, if they were done by their other servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service?" (*a*).

Imputations made to persons not having a corresponding interest.

(7) However, imputations which, if made to persons having a corresponding interest, would be privileged in the absence of actual malice, cease to be so if spread broadcast. Thus, imputations circulated freely against another in order to injure him in his calling, however bonâ fide made, are not privileged. For instance, a clergyman is not privileged in slandering a schoolmaster about to start a school in his parish (*b*). So, the unnecessary transmission by a post office telegram of libellous matter, which would have been privileged if sent by letter, avoids the privilege (*c*). And where by the defendant's negligence that which would be a privileged communication if made to A., is in fact placed in

(*z*) *Cowles* v. *Potts*, 34 L. J. Q. B. 247.
(*a*) *Hunt* v. *Great Northern Rail. Co.*, [1891] 2 Q. B. 189.
(*b*) *Gilpin* v. *Fowler*, 9 Ex. 615.
(*c*) *Williamson* v. *Freer*, L. R. 9 C. P. 393.

an envelope directed to B., whereby the defamatory matter is published to B., the defendant will be liable (*d*). Art. 57.

(8) But the privilege is not lost when the defamatory statement is in the reasonable and ordinary course of business incidentally published to clerks for the purpose of being copied. So if a solicitor dictates to his clerk a letter, which would be privileged if written by him personally, the solicitor's privilege covers the publication for this purpose to his clerk; and if a company writes to another company a defamatory statement of a third person (which would be privileged), the publication to the clerks who in the ordinary course copy the letter, is privileged (*e*). Incidental publication to persons not having interest.

(9) Extracts from, and abstracts of, Parliamentary papers and reports are privileged if published bonâ fide and without malice (*f*). The reports and papers themselves, if published by authority of Parliament, are absolutely privileged, and actions brought in respect thereof may be stayed (*g*). Extracts from Parliamentary papers.

(10) The publication without malice of a fair and accurate report of judicial proceedings before a properly constituted judicial tribunal, exercising its jurisdiction in open court, is privileged (*h*). This is a common law defence, open to all persons. It is not the same as the absolute privilege given by statute to reports in newspapers when published contemporaneously (*i*). Reports of judicial proceedings.

(11) Reports of their proceedings published by *quasi* judicial bodies bonâ fide and without any malice, are privileged. For instance, where the General Council of Medical Education and Registration (who are empowered by statute to strike the names of persons off the register of qualified medical practitioners) struck off the plaintiff's name, and, in their annual published report, stated the circumstances Reports of *quasi* judicial proceedings.

(*d*) *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B. 54.

(*e*) *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842; *Edmondson* v. *Birch*, [1907] 1 K. B. 371.

(*f*) Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), s. 3; *Mangena* v. *Wright*, [1909] 2 K. B. 958.

(*g*) Parliamentary Papers Act, 1840, ss. 1, 2.

(*h*) *Kimber* v. *Press Association, Limited*, [1893] 1 Q. B. 65.

(*i*) See *ante*, p. 122.

Art. 57.

which induced them to do so, it was held that in the absence of actual malice the publication was privileged (*k*).

Speeches at county councils, etc.

(12) So, too, there is qualified privilege for speeches made at meetings of district and county councils (*l*).

Newspaper reports of meetings, and publication of public notices, etc.

(13) By s. 4 of the Law of Libel Amendment Act, 1888 (*m*), it is enacted that a **fair and accurate report published in any newspaper of the proceedings of a public meeting,** or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a town council, board of guardians, or local authority, constituted under the provisions of any Act of Parliament, or of any meeting of any commissioners, Select Committees of either House of Parliament, and the publication *at the request* of any Government office or department, officer of state, commissioner of police or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously. But the protection intended to be afforded by that section is not available if the defendant has refused to insert in the newspaper in which the matter complained of appeared, a reasonable explanation or contradiction by, or on behalf of, the plaintiff. Nor is it available to protect fair and accurate reports of statements made to the editors of newspapers by private persons as to the conduct of a public officer (*n*).

ART. 58.—*Apology.*

(1) At common law the fact that the defendant has apologised for having defamed the plaintiff is no defence.

(2) By statute the defendant **in any action for libel or slander** may prove **in mitigation of damages**

(*k*) *Allbutt* v. *General Council, etc.*, 37 W. R. 771.

(*l*) *Royal Aquarium Society* v. *Parkinson*, [1892] 1 Q. B. 431; *Pittard* v. *Oliver*, [1891] 1 Q. B. 474.

(*m*) 51 & 52 Vict. c. 64.

(*n*) *Davis* v. *Shepstone*, 11 App. Cas. 187.

Art. 58.

that he made or offered an apology before the commencement of the action, or as soon afterwards as he had an opportunity, if the action was begun before he had an opportunity of doing so (*o*).

(3) In any action for libel contained in any **newspaper or other periodical** publication, it is a good **defence** that such libel was inserted without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper a full apology, or, if the paper or periodical is published at intervals exceeding one week, that he offered to publish the apology in any newspaper or periodical selected by the plaintiff (*p*). With this defence there must be payment of money into court by way of amends, and *no other defence can be pleaded* (*q*).

NOTE.—If the defendant intends to give evidence of an apology in mitigation of damages, he must give notice with his defence (*r*). The Act of 1888 also enables a defendant, in the case of a libel *in a newspaper*, to give evidence in mitigation of damage that the plaintiff has recovered, or brought actions for, damages in respect of other libels to the same effect (*s*).

ART. 59.—*Slander of Title and Slander of Goods.*

(1) Slander of title is a false statement disparaging a person's **title** to property.

(*o*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 1.
(*p*) *Ibid.*, s. 2.
(*q*) Libel Act, 1845 (8 & 9 Vict. c. 75), s. 2; R. S. C., Order XXII., r. 1.
(*r*) Libel Act, 1843, s. 1.
(*s*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 6.

Art. 59.

(2) Slander of goods is a false statement disparaging goods manufactured or sold by another.

(3) The slander may be oral or in writing or print.

(4) An action for slander of title or slander of goods will lie if—

(i) The statement is false;

(ii) The publication is malicious;

(iii) The publication causes special damage.

NOTE.—(1) Actions of this kind are not properly actions for libel or slander. The cause of action is for damage wilfully and intentionally done without just occasion or excuse (*t*). The statement to be actionable need not be defamatory of the person (*u*), and it will be observed that even though the statement is in writing, it is not actionable without proof of special damage (*x*). There must also always be evidence of actual malice, or at least absence of reasonable cause for making the statement (*y*).

Special damage.

(2) In every case of this kind there must be proof of actual damage, *i.e.*, of actual and temporal loss, resulting from the slander. In the case of slander of goods, loss of custom and falling off in the sales is the usual kind of special damage. Where the slander is of title to property, real or personal, the special damage may be the diminished value of the property by reason of difficulty of selling or letting it (*z*).

Puffing one's own goods.

(3) For a person in trade to puff his own goods or proclaim their superiority over those of his rivals, is not actionable, even though the statement is untrue and made

(*t*) *Per* BOWEN, L.J., in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524 [C. A.], at p. 527.

(*u*) *Ibid.*

(*x*) *White* v. *Mellin*, [1895] A. C. 154.

(*y*) *Wren* v. *Wild*, L. R. 4 Q. B. 730; *Hubbuck & Sons* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86 [C. A.]; *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; *Halsey* v. *Brotherhood*, 19 Ch. D. 386 [C. A.].

(*z*) *White* v. *Mellin, supra; Ratcliffe* v. *Evans, supra.*

maliciously, and causes damage to the rivals. Such a statement may be disparaging to the rivals' goods, but the fact that the person making the statement is a rival puffing his own goods is a lawful excuse for making the statement (*a*). And generally it seems that a disparaging statement of another's title or goods is excusable if made *bonâ fide* for the protection of one's own property, and not *malâ fide* for the purpose of injuring another's (*b*). Art. 59.

(*a*) *Hubbuck & Sons* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86 [C. A.].

(*b*) *Halsey* v. *Brotherhood*, 19 Ch. D. 386 [C. A.].

CHAPTER II.

OF MALICIOUS PROSECUTION.

ART. 60.—*General Rule.*

(1) Malicious prosecution of criminal proceedings consists in instituting unsuccessful criminal proceedings maliciously and without reasonable or probable cause (*a*).

(2) Malicious prosecution of criminal proceedings causing actual damage to the party prosecuted is a tort, for which he may maintain an action.

Distinct from false imprisonment.

The distinction between malicious prosecution and false imprisonment has already been pointed out. Prosecution consists in setting a judicial officer in motion. Imprisonment consists in causing a person to be arrested or imprisoned without the intervention of a judicial officer.

Analysis.

It will be seen from the above article, that in order to sustain an action for malicious prosecution, five factors must co-exist, viz.: (1) a prosecution of the plaintiff by the defendant; (2) want of reasonable and probable cause for that prosecution; (3) malice; (4) the determination of the prosecution in favour of the party prosecuted; and (5) damage caused to that party by the prosecution. If any one of these five factors is absent, no action will lie. It is, therefore, desirable to examine each one of these elements in detail.

(*a*) See *Churchill* v. *Siggers*, 3 E. & B. 929, 937; *Johnson* v. *Emerson*, L. R. 6 Ex. 329; and *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674 [C. A.].

Art. 61.

ART. 61.—*Prosecution by the Defendant.*

(1) The prosecution must have been instituted by the defendant against the plaintiff, and not merely by the authorities on facts furnished by the defendant.

(2) A person who has not instituted proceedings maliciously may be guilty of malicious prosecution if, after they have been begun properly by himself or another, he continues them maliciously and without reasonable and probable cause, as when in the course of the proceedings he acquires positive knowledge of the innocence of the accused (*b*).

Illustrations.

Mistake of magistrate.

(1) Thus, if a person bonâ fide lays before a magistrate a statement of facts, without making a specific charge of crime, and the magistrate erroneously treats the matter as a felony, when it is in reality only a civil injury, and issues his warrant for the apprehension of the plaintiff, the defendant who has complained to the magistrate is not responsible for the mistake. For *he* has not instituted the prosecution, but the magistrate (*c*). But if a person goes before a magistrate and makes a specific charge against another, as by swearing an information that that other has committed a criminal offence, he is the person prosecuting, for he and not the magistrate has set the law in motion. So, too, if a person instructs a solicitor to prosecute, he is liable for the consequences if he does it maliciously and without reasonable and probable cause.

(2) It has been held that if a person acting bonâ fide swears an information before a magistrate, under s. 10 of the Criminal Law Amendment Act, 1885, that he has reason-

(*b*) *Per* COCKBURN, C.J., in *Fitzjohn* v. *Mackinder*, 9 C. B. (N.S.) 505, and see *Weston* v. *Beeman*, 27 L. J. Ex. 57. This seems to be the effect of the cases cited; but the point is nowhere very clearly decided. *Fitzjohn* v. *Mackinder* should be carefully studied, as the judges deciding it give different reasons for their decision.

(*c*) *Wyatt* v. *White*, 29 L. J. Ex. 193; *Cooper* v. *Booth*, 3 Esp. 135, 144.

able grounds for suspecting that a woman or girl is detained for immoral purposes, and thereupon the magistrate issues a search warrant, the person swearing the information is not a prosecutor, as the magistrate acts judicially upon such information, and the decision of the magistrate that there is reasonable cause for suspicion protects the person giving the information (*d*). Art. 61.

ART. 62.—*Want of Reasonable and Probable Cause.*

(1) The onus of proving the absence of reasonable and probable cause for the prosecution rests on the plaintiff (*e*).

(2) The jury find the facts on which the question of reasonable and probable cause depends; but the judge determines whether those facts do constitute reasonable and probable cause (*f*).

(3) No definite rule can be laid down for the exercise of the judge's determination (*g*); but the defendant will be deemed to have had reasonable and probable cause for a prosecution where (a) he took reasonable care to inform himself of the true facts; (b) he honestly, although erroneously, believed in his information, and (c) that information, if true, would have afforded a primâ facie case for the prosecution complained of (*h*).

Note, that in both malicious prosecution and false imprisonment the question of what amounts to reasonable Burden of proof.

(*d*) *Hope* v. *Evered*, 17 Q. B. D. 338.
(*e*) *Lister* v. *Perryman*, L. R. 4 H. L. 521; *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.
(*f*) *Panton* v. *Williams*, 2 Q. B. 169 [Ex. Ch.].
(*g*) *Lister* v. *Perryman*, L. R. 4 H. L. 521.
(*h*) See *Abrath* v. *North Eastern Rail. Co.*, *ubi supra*.

Art. 62.

and probable cause is for the judge. But there is this important difference, that in malicious prosecution it is for the plaintiff to prove the absence of reasonable and probable cause; whereas in false imprisonment, the imprisonment is primâ facie wrongful, and it is for the defendant, if he can, to prove that he had reasonable and probable cause.

Reasonable and probable cause defined.

In *Hicks* v. *Faulkner* (*i*), HAWKINS, J., says: "I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead an ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was **probably** guilty of the crime imputed. There must be first an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conviction; thirdly, such secondly mentioned belief must be based upon **reasonable** grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."

A man who makes a criminal charge against another, cannot absolve himself from considering whether the charge is reasonable and probable, by delegating that question to an agent, even although that agent be presumably more capable of judging. Thus, the opinion of counsel as to the propriety of instituting a prosecution, will not excuse the defendant if the charge was in fact unreasonable and improbable. For as HEATH, J., said in *Hewlett* v. *Cruchley* (*k*), "it would be a most pernicious practice if we were to introduce the principle that a man, by obtaining the opinion of counsel, by applying to a weak man or an ignorant man, might shelter his malice in bringing an unfounded prosecution."

With regard to the amount of care which a prosecutor is bound to exercise before instituting a prosecution, it would

(*i*) 8 Q. B. D. 167, at p. 171. (*k*) 5 Taunt. 277, at p. 283.

seem that although he must not act upon mere tittle-tattle or rumour, or even upon what one man has told his immediate informant, without himself interviewing the first-mentioned man, yet where his immediate informant is himself cognizant of other facts, which, if true, strongly confirm the hearsay evidence, that will be sufficient to justify the prosecutor in acting, without first going to the source of the hearsay (*l*). But as circumstances are infinite in variety, it is quite impossible to lay down any guiding principle as to what steps a person ought reasonably to take for informing himself of the truth before instituting a prosecution. **Art. 62.**

ART. 63.—*Malice.*

Malice means not necessarily spite or ill-will but any indirect or improper motive — any motive other than that of securing the ends of justice. If there is want of reasonable and probable cause malice may be inferred without other evidence; but this inference is not conclusive, and may be rebutted (*m*).

(1) If a person prosecutes another to prevent that other bringing actions against him (*n*), or to stop the mouth of a witness (*o*), or to frighten others and thereby deter them from committing depredations on the prosecutor's property (*p*), all these are indirect and improper motives which may constitute malice. Illustrations. Improper motives.

(2) So, too, where one is assaulted justifiably, and institutes criminal proceedings for the assault; if in the opinion of the jury he commenced such proceedings knowing that he was wrong and had no just cause of complaint, malice may be presumed (*q*).

(*l*) *Lister* v. *Perryman*, L. R. 4 H. L. 521.
(*m*) *Brown* v. *Hawkes*, [1891] 2 Q. B. 718 [C. A.].
(*n*) *Leith* v. *Pope*, 2 W. Bla. 1327.
(*o*) *Haddrick* v. *Heslop*, 12 Q. B. 267.
(*p*) *Stevens* v. *Midland Rail. Co.*, 10 Ex. 352, 356.
(*q*) *Hinton* v. *Heather*, 14 M. & W. 131.

Art. 63.

Honest mistake.

(3) In *Brown* v. *Hawkes* (*r*) it was pointed out that a prosecutor may act without reasonable and probable cause and yet not be malicious. Stupidity and malice are not the same thing; and if the defendant honestly believed in the plaintiff's guilt, and there is no evidence that he was actuated by any improper motive, even though he had not taken care to inform himself of the facts, and had no reasonable and probable cause for prosecuting, yet he cannot be said to have acted maliciously. Honest belief rebuts the inference of malice from absence of reasonable and probable cause.

Bad memory.

(4) So, too, where the defendant has honestly and bonâ fide instituted the prosecution, he is not liable, although owing to a defective memory he has wrongly accused the plaintiff (*s*).

Malice in a corporation.

(5) Whether a corporation can be guilty of malicious prosecution was, until recently, not free from doubt, it being said that a corporation having no mind cannot entertain malice (*t*). In *Cornford* v. *Carlton Bank* (*u*), DARLING, J., held that if a corporation institutes a prosecution acting on motives which in an individual would amount to malice, the corporation may be said to have prosecuted maliciously, and it is now well established that an action of malicious prosecution will lie against a corporation.

ART. 64.—*Failure of the Prosecution.*

It is necessary to show that the proceeding has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination (*x*).

Explanation of reasons for rule.

(1) This rule, which at first sight appears somewhat harsh, is founded on good sense, and applies even where

(*r*) [1891] 2 Q. B. 718 [C. A.].
(*s*) *Hicks* v. *Faulkner*, 8 Q. B. D. 167.
(*t*) See *per* Lord BRAMWELL in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.
(*u*) [1899] 1 Q. B. 392. In the Court of Appeal ([1900] 1 Q. B. 22 [C. A.]) it was conceded that the action would lie.
(*x*) *Basèbè* v. *Matthews*, L. R. 2 C. P. 684.

Art. 64.

the result of the prosecution cannot be appealed (*y*). As CROMPTON, J., said, in *Castrique* v. *Behrens* (*z*), "there is no doubt on principle and on the authorities, that an action lies for maliciously, and without reasonable and probable cause, setting the law of this country in motion, to the damage of the plaintiff. . . . But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be that, if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

(2) Upon the same principle, an action for trespass by wrongfully causing execution to be issued under a judgment obtained by fraud or irregularity, will not lie until the judgment has been set aside. It is not competent to any person to aver anything contradicting or impeaching the judgment as long as it stands (*a*).

ART. 65.—*Damage.*

In order to support an action for malicious prosecution, it is necessary to show some damage resulting to the plaintiff as the natural consequence of the prosecution complained of (*b*).

Damage need not be pecuniary.

The damage need not necessarily be pecuniary. "It may be either the damage to a man's fame, as if the matter he

(*y*) *Basèbè* v. *Matthews*, L. R. 2 C. P. 684.

(*z*) 30 L. J. Q. B. 163, at p. 168.

(*a*) *Huffer* v. *Allen*, L. R. 2 Ex. 15; *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210.

(*b*) *Cotterell* v. *Jones and Ablett*, 21 L. J. C. P. 2; *Byne* v. *Moore*, 5 Taunt. 187.

Art. 65. is accused of be scandalous, or where he has been put in danger to lose his life, or limb, or liberty ; or damage to his property, as where he is obliged to spend money in necessary charges to acquit himself of the crime of which he is accused" (*c*).

ART. 66.—*Maliciously taking Proceedings in Bankruptcy.*

An action will lie for maliciously and without reasonable and probable cause instituting bankruptcy proceedings (*d*).

The plaintiff in such an action must prove that the proceedings terminated in his favour (*e*), and (*semble*) that he has suffered damage beyond the mere costs incurred.

Comment. Formerly actions lay for maliciously bringing a civil action, because although the action terminated in the defendant's favour, he might have suffered damage to his fair fame, and been put in peril of his liberty. Such actions are now never brought, and probably cannot be brought. The defendant in an action is not now liable to arrest before judgment, and the result of the action (if it terminates in his favour) saves him from damage to his fair fame. He may indeed incur costs beyond what he can recover from the other party, but this is not a legal ground of damage, as the only costs which the law recognises and for which it will recompense him, are the costs properly incurred in the action itself, and for which he gets judgment in the action. Hence there is no modern example of an action for maliciously taking ordinary civil proceedings (*f*).

(*c*) Mayne's Treatise on Damages, p. 345.

(*d*) *Johnson* v. *Emerson*, L. R. 6 Ex. 329.

(*e*) *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210.

(*f*) See *per* BOWEN, L.J., in *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674, 689.

Art. 66.

But proceedings for bankruptcy and for winding up companies are *quasi* criminal in their nature. The party against whom they are taken may suffer severely in his credit, and this is sufficient ground of damage to found the action, at all events in the case of a trader or trading company (*g*). Thus, in *Quartz Hill Gold Mining Co.* v. *Eyre*, it was held that, in an action for maliciously taking proceedings to wind up a company, no pecuniary loss or special damage need be proved, as the presentation of a petition for winding up is from its very nature calculated to injure the credit of a trading company. It may be that in the case of a non-trader, some other special damage would have to be shown (*h*).

No action will lie unless it is shown that the adjudication or winding-up order has been set aside. As long as it stands, it is conclusive evidence that the proceedings were properly taken, and therefore is an absolute bar to any action (*i*).

(*g*) *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674.
(*h*) See *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106 [C. A.].
(*i*) *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210.

CHAPTER III.

OF MAINTENANCE.

ART. 67. — *Definition.*

(1) Maintenance is the unlawful assistance, by money or otherwise, proffered by a third person to either party to a **civil suit**, to enable him to prosecute or defend it.

(2) Assistance of another in a suit is not unlawful if (a) the maintainer has a common interest in the action with the party maintained; or (b) the maintainer is actuated by motives of charity, bonâ fide believing that the person maintained is a poor man oppressed by a rich one.

Distinguished from malicious prosecution.

Maintenance differs from malicious prosecution in four respects:

(a) It applies to civil, not criminal proceedings.
(b) It consists not in instituting proceedings on one's own behalf, but in assisting another.
(c) Malice is not a necessary ingredient.
(d) It is not necessary to prove that the proceedings terminated in favour of the person who is person who brings the action of maintenance.

Illustrations.

(1) Thus, in the well-known case of *Bradlaugh* v. *Newdegate* (*a*), the plaintiff, having sat and voted as a member of Parliament without having made and subscribed the oath, the defendant, who was also a member of Parliament, procured C. to sue the plaintiff for the penalty imposed for

(*a*) 11 Q. B. D. 1.

Art. 67.

so sitting and voting. C. was a person of insufficient means to pay the costs in the event of the action being unsuccessful:—*Held*, that the defendant and C. had no common interest in the result of the action for the penalty, and that the conduct of the defendant in respect of such action amounted to maintenance, for which he was liable to be sued by the plaintiff. The plaintiff accordingly recovered all the costs he had incurred in the first action.

Common interest.

(2) But, on the other hand, where there is a common interest believed on reasonable grounds to exist, assistance in bringing or defending an action is justifiable. A master for a servant, or a servant for a master, an heir, a brother, a son-in-law, a brother-in-law, a fellow commoner defending rights of common, or a landlord defending his tenant in a suit for tithes (*b*).

(3) So, if a number of proprietors of land subscribe to defend an action relating to the land of one in the reasonable belief that they have a common interest in the result, that is not maintenance (*c*).

Interest arising out of charity.

(4) The other exception is where a rich man gives money to a poor man to maintain a suit out of charity. And the motive is none the less charitable within this exception because it is induced by common religious sympathy, as when the Kensit Crusade Committee assisted a poor man in taking proceedings to get a child removed from a home to the religious principles of which the committee objected (*d*). And this exception is applicable notwithstanding that if the person advancing the money had made full inquiry, he would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted (*e*).

(*b*) *Per* COLERIDGE, C.J., in *Bradlaugh* v. *Newdegate*, 11 Q. B. D., at p. 11.

(*c*) *Findon* v. *Parker*, 11 M. & W. 675. See, too, *British Cash and Parcel Conveyers, Limited* v. *Lamson Store Service Co.*, [1908] 1 K. B. 1006 [C. A.], and *Alabaster* v. *Harness*, [1895] 1 Q. B. 339 [C. A.].

(*d*) *Holden* v. *Thompson*, [1907] 2 K. B. 489.

(*e*) *Harris* v. *Briscoe*, 17 Q. B. D. 504 [C. A.].

CHAPTER IV.

OF SEDUCTION.

ART. 68.—*Enticing and Harbouring.*

Every person is liable to an action for damages who wilfully assaults or entices away another's wife or servant, or knowingly harbours a wife or a servant who has wrongfully quitted his or her master's service (*a*).

The gist of the action for enticing away or harbouring a wife or servant, is loss of society of the wife or of the services of the servant. Formerly actions were sometimes brought for beating a wife or servant, whereby the husband or master lost the society or services of his wife or servant. Actions of this sort are now rarely brought.

It seems that in the case of a **servant** (where the action is not brought by a parent or other person *in loco parentis*), the only damages recoverable are the actual pecuniary loss which the plaintiff suffers (*b*).

A master whose servant is injured by the negligence of the defendant, may, it seems, sue for damages for loss of service, unless the injuries have caused the immediate death of the servant (*c*).

(*a*) *Winsmore* v. *Greenbank*, Willes, 577; *Smith* v. *Kaye*, 20 T. L. R. 261; *Blake* v. *Lanyon*, 6 Term Rep. 221.

(*b*) *McKenzie* v. *Hardinge*, 23 T. L. R. 15. In this case the defendant seduced a servant of the plaintiff so that she became pregnant, and the plaintiff lost her services.

(*c*) *Berringer* v. *Great Eastern Rail. Co.*, 4 C. P. D. 163; *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.]. See *ante*, p. 73, note (*t*).

Art. 69.

ART. 69.—*The ordinary Action for Seduction.*

(1) A parent may bring an action for damages against one who seduces his daughter whilst she is in his service, whereby he is deprived of her services.

(2) The plaintiff must prove (a) that the female seduced was at the time of the seduction in his service, actual or constructive (*d*); (b) that he lost her services, either by reason of her pregnancy and confinement, or by reason of her being kept away by the persuasion of the defendant (*e*).

(3) A daughter is constructively in her parents' service if she lives at home and performs in fact any slight services.

(4) A daughter under the age of twenty-one, unmarried and not in other service, is presumed to be in the service of her parents (*f*).

Foundation of action loss of service.

The ordinary action for seduction is founded on the action for assaulting or enticing away a servant. Accordingly, it is always necessary to prove that the female seduced was in the service of the plaintiff, and that in consequence of the seduction the plaintiff lost her services. The substance of the action, however, is not the loss of services, but the injury done to the female seduced and to the honour of her family. She cannot bring an action herself, for she must have given her consent to the connexion, and *volenti non fit injuria*. Hence the action must be brought by some one who has been deprived of her services by the wrongful act of the seducer.

(*d*) *Davies* v. *Williams*, 10 Q. B. 725.

(*e*) *Hedges* v. *Tagg*, L. R. 7 Ex. 283; *Evans* v. *Walton*, L. R. 2 C. P. 615.

(*f*) *Harris* v. *Butler*, 2 M. & W. 539, 542.

Art. 69.

Accordingly, the plaintiff in an action for seduction must always prove—

(i) **That the female seduced was in his service, actual or constructive, at the time of the seduction.**

(ii) **That by reason of her confinement or otherwise, he was deprived of her services.**

Who can bring action.

The action may be brought not only by a parent, but by any one *in loco parentis*, such as a person who has adopted the girl as his daughter, or a brother or an aunt with whom the girl makes her home (*g*). It is not necessary that the female seduced should have been under a contract of service with the plaintiff, it is enough that she lived in his house and in fact performed services.

Seduction.

Though these actions are usually brought for loss of service by the debauchery and consequent illness of the daughter, this is not a necessary part of the cause of action. It is enough to show that the daughter has been enticed away. In such a case, even though there was no actual contract of service, the parent may recover general damages for being deprived of the services actually rendered by his daughter. Perhaps cases of this sort belong more properly to those dealt with in the preceding Article, but general damages for loss of reputation and injured feelings may, it seems, be given (*h*).

Illustrations.

Evidence of service.

(1) Thus, the plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three days' visit, with her employer's permission, to the plaintiff, her widowed mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother:—*Held*, that there was no evidence of service at the time of the seduction. And by KELLY, C.B., and MARTIN and BRAMWELL, BB., that the action must fail also on the ground that *the confinement* did not take place whilst the daughter was in the plaintiff's service (*i*).

(*g*) See note to *Fores* v. *Wilson*, 1 Peake, 55, 56; *Murray* v. *Fitzgerald*, [1906] 2 I. R. 254 [C. A.].

(*h*) See *Evans* v. *Walton*, L. R. 2 C. P. 615.

(*i*) *Hedges* v. *Tagg*, L. R. 7 Ex. 283.

Art. 69.

(2) When a girl was seduced whilst living at home with her father and mother, but the father died before her confinement, it was held that the widowed mother could not bring an action against the seducer, as the girl was not in her service at the time of the seduction, but in that of the father (*k*).

(3) In *Evans* v. *Walton* (*l*), the daughter of the plaintiff (a publican), who lived with him and acted as his barmaid, but without any express contract or wages, was induced by the defendant to leave her father's house, and live with him at his lodgings: it was held, that the relation of master and servant might be implied from these circumstances, and that it mattered not whether the service was at will or for a fixed period. There was no allegation of debauchery—but the plaintiff lost the services of his daughter whilst she was living with the defendant.

(4) In the case of a daughter living at home, such small services as milking, or even making tea, are sufficient evidence of service (*m*).

(5) Where a girl was in the defendant's service when seduced by him, but was allowed to go home for an afternoon and evening twice a week, and on those occasions assisted in household work and in looking after the other children, it was held that the relationship of master and servant did not exist between the plaintiff and the daughter so as to support an action for seduction (*n*).

(6) And where the daughter at the time of the seduction is acting as housekeeper to another person, the action will not lie (*o*); not even when she partly supports her father (*p*).

Daughter under age.

(7) The plaintiff's daughter, *being under age*, left his house and went into service. After nearly a month, the

(*k*) *Hamilton* v. *Long*, [1903] 2 I. R. 407; affirmed, [1905] 2 I. R. 552 [C. A.].

(*l*) L. R. 2 C. P. 615.

(*m*) *Bennett* v. *Allcott*, 2 Term Rep. 166; *Carr* v. *Clarke*, 2 Chit. R. 260.

(*n*) *Whitbourne* v. *Williams*, [1901] 2 K. B. 722 [C. A.]. See also *Thompson* v. *Ross*, 5 H. & N. 16.

(*o*) *Dean* v. *Peel*, 5 East, 45.

(*p*) *Manley* v. *Field*, 29 L. J. C. P. 79.

master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her. It was held, that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of her father to her services revived, and there was, therefore, sufficient constructive service to maintain an action for the seduction (*q*). Art. 69.

(8) When the child is only absent from her father's house on a temporary visit, there is no termination of her services, provided she still continues, in point of fact, one of his own household (*r*).

(9) When an orphan girl, who lived on a farm with her younger brother and managed the house for him, was seduced, it was held that there was sufficient relation of master and servant to enable him to bring an action and recover general damages against the seducer (*s*). Action by brother.

ART. 70.—*Misconduct of Parent.*

If a parent has introduced his daughter to, or has encouraged, profligate or improper persons, or has otherwise courted his own injury, he has no ground of action if she be seduced.

Thus, where the defendant was received as the daughter's suitor, and it was afterwards discovered by the plaintiff that he was a married man, notwithstanding which he allowed the defendant to continue to pay his addresses to his daughter on the assurance that the wife was dying, and the defendant seduced the daughter: it was held, that the plaintiff had brought about his own injury, and had no ground of action (*t*).

(*q*) *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599.
(*r*) *Griffiths* v. *Teetgen*, 15 C. B. 344.
(*s*) *Murray* v. *Fitzgerald*, [1906] 2 I. R. 254 [C. A.].
(*t*) *Reddie* v. *Scoolt*, 1 Peake, 240.

Art. 71.

ART. 71.—*Damages in ordinary Action for Seduction.*

(1) In cases of seduction, in addition to the actual damage sustained, including any expenses incurred through the daughter's illness, damages may be given for the loss of the society and comfort of the daughter who has been seduced, and for the dishonour, anxiety, and distress which the plaintiff has suffered (*u*).

(2) Where more than ordinarily base methods have been employed by the seducer, the damages may be aggravated. On the other hand, the defendant may show, in mitigation of damages, the loose character of the girl seduced.

(1) Thus, as was observed by Lord ELDON, in *Bedford* v. *McKowl* (*x*), "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example." Damages given by a jury for this kind of tort, will, therefore, rarely be reduced by the court on the ground that they are excessive.

Aggravation of damages.

(2) *A fortiori* will this be the case, where the seducer has made his advances under the guise of matrimony. As was said by WILMOT, C.J., in a case of that character: "If the party seduced brings an action for breach of promise of marriage (*y*), so much the better. If much greater damages

(*u*) *Bedford* v. *McKowl*, 3 Esp. 119; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599.

(*x*) 3 Esp. 119.

(*y*) The loss caused to the plaintiff by *breach* of a *promise* to marry, however, is not to be taken into consideration, for that is a civil injury to *her* and not to the father.

had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (*z*). Art. 71.

(3) On the other hand, the defendant may, in mitigation of damages, call witnesses to prove that they have had sexual intercourse with the girl previously to the seduction (*a*). And, generally, the previous loose or immoral character of the girl seduced is ground for mitigation; as, for instance, the using of immodest language or submitting herself to the defendant under circumstances of extreme indelicacy. Mitigation of damages.

(*z*) *Tullidge* v. *Wade*, 3 Wils. 18.

(*a*) *Eager* v. *Grimwood*, 16 L. J. Ex. 236; *Verry* v. *Watkins*, 7 C. & P. 308.

CHAPTER V.

TRADE MOLESTATION.

Art. 72.—*Inducing Breach of Contract.*

A person who knowingly and without sufficient justification induces another to break a contract with a third person whereby that third person suffers damage, commits a tort at common law (*a*).

Comment.

This proposition of law was established after a good deal of controversy by the cases cited in the note. It was at one time supposed that though an action lay for inducing a menial servant to break his contract of service, the rule did not apply to other contracts; but by successive stages the rule has been extended to all contracts, such as a contract with an opera singer, or a contract to sell goods (*b*).

The rule is confined to cases where the defendant has induced someone to **break** a contract. It has not been extended to cases where one person has simply induced someone **not to enter into the employment of another** or **not to make a contract** with another, the inducement not being accompanied by any threats or violence; and it has been laid down that it cannot be actionable merely to persuade or induce another to do that which that other has a right to do, viz., not to enter into a contract, or lawfully and without any breach of contract terminate a contract, even though this be done from an evil motive and result in

(*a*) *Lumley* v. *Gye*, 2 E. & B. 216; *Temperton* v. *Russell*, [1893] 1 Q. B. 715 [C. A.]; *Quinn* v. *Leathem*, [1901] A. C. 495.

(*b*) See the Illustrations.

Art. 72.

damage (*c*). But these questions cannot be regarded as finally settled.

The Trade Disputes Act, 1906.

In connection with actions of the kind discussed in this Article, the effect of the Trade Disputes Act, 1906 (*d*), must be considered. That Act, besides enacting that no court shall entertain any action of tort against a trade union (*e*), provides (*f*) that: "*An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment.*"

This section gives no protection to persons who induce breaches of contract by **threats** or **violence**, for then there is some other ground of action besides the ground that "it induces some person to break a contract." But it changes the law in this respect, that if the inducement to break a contract be **without threat or violence**, then this is no longer actionable if it is done "in contemplation or furtherance of a trade dispute" (*g*).

Examples.

Lumley v. *Gye*.

(1) The plaintiff agreed with a famous singer to perform in an opera. The defendant, a rival manager, offered the singer a large sum of money to break her contract with the plaintiff and sing for him. Assuming that there was *an actual contract of service*, a breach of which the defendant had knowingly brought about, and the plaintiff had thereby suffered damage, there was a good cause of action (*h*).

Temperton v. *Russell*.

(2) In order to induce the plaintiff to carry on his trade in a particular manner, agreeably to the wishes of a trade union, the defendants induced B. to break a contract he

(*c*) *Per* Lord MACNAGHTEN in *Allen* v. *Flood*, [1898] A. C., at p. 151; and *per* Lord HERSCHELL, *ibid.*, p. 121. But see *per* Lord LOREBURN in *Conway* v. *Wade*, [1909] A. C. 506, at p. 510.

(*d*) 6 Edw. 7, c. 47.

(*e*) *Ibid.*, s. 4. See *ante*, Art. 21.

(*f*) By *ibid.*, s. 3.

(*g*) *Per* Lord LOREBURN in *Conway* v. *Wade*, [1909] A. C. 506, 511. As to what is a trade dispute, see that case and the definition in the Trade Disputes Act of 1906. Shortly, it must be a dispute either between employers and workmen or between workmen and workmen connected with the employment, or terms or conditions of employment of some person or persons.

(*h*) *Lumley* v. *Gye*, 2 E. & B. 216, followed and approved in Court of Appeal in *Bowen* v. *Hall*, 6 Q. B. D. 333 [C. A.], and approved by the House of Lords in *Quinn* v. *Leathem*, [1901] A. C. 495.

had with the plaintiff for the supply of building materials. The plaintiff thereby suffered damage and the defendants were held liable (*i*). Art. 72.

(3) The plaintiffs sold their goods wholesale to factors who entered into agreements with them not to sell them to dealers on the plaintiffs' "suspended list." The defendants employed agents to obtain the plaintiffs' goods for them from these factors by falsely representing that they were independent dealers and dealing in fictitious names. By these fraudulent means the defendants induced the factors to break their agreements with the plaintiffs, and as they had interfered, without justification, with the contractual relations between the plaintiffs and the factors, and the plaintiffs had thereby suffered damage, they had a cause of action against the defendants (*k*). Procuring breach of contract by fraud.

ART. 73.—*Molestation by Threats, Violence and Conspiracy.*

One who intentionally and without sufficient justification by threats, intimidation, molestation or violence, induces persons not to work for or trade with another whereby that other suffers damage, commits a tort at common law (*l*).

(1) The plaintiffs were endeavouring to trade with natives on the coast of Calabar. The defendant fired a cannon at the natives in order to drive them away and thereby deterred them from trading with the plaintiffs. This was held actionable (*m*). Examples. Molestation.

(2) The plaintiff was a stone mason. The defendant was held liable for threatening his workmen and customers with

(*i*) *Temperton* v. *Russell*, [1893] 1 Q. B. 715 [C. A.].
(*k*) *National Phonograph Co.* v. *Edison Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335 [C. A.].
(*l*) *Quinn* v. *Leathem*, [1901] A. C. 495.
(*m*) *Tarleton* v. *M'Gawley*, 1 Peake, 205.

Art. 73.

mayhem and suits so that they desisted from doing business with the plaintiff (*n*).

Warning. *Allen* v. *Flood.*

(3) The plaintiffs were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were **liable to be discharged at any time.** Some ironworkers who were employed on the ironwork of the ship objected to the plaintiffs being employed, on the ground that they had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. The defendant, who was a delegate of the union, was sent for by the ironworkers, and informed that they intended to leave off working. *The defendant then warned the employers that, unless the plaintiffs were discharged, all the ironworkers would be called out on strike,* and that wherever the shipwrights were employed the iron men would cease work. The employers accordingly discharged the plaintiffs, *i.e.*, lawfully terminated their engagement and refused to re-engage them. They broke no contract in so doing. The plaintiffs thereupon sued the defendant, and the jury found that he had maliciously induced the employers to "discharge" the plaintiffs, and gave damages. The House of Lords, however, by a majority, dismissed the action, on the ground that the defendant had violated no legal right of the plaintiffs, and done no unlawful act in merely *warning* the employers of the consequences of their continuing to employ the plaintiffs; and that therefore his conduct, however malicious or bad his motive might be, was not actionable (*o*).

Note that no threats, violence or intimidation were used by the defendant. He only warned them of danger which would result from continuing to employ the plaintiffs.

Quinn v. *Leathem.*

(4) The later case of *Quinn* v. *Leathem* (*p*) is distinguishable from *Allen* v. *Flood*, for in that case the defendants conspired to injure him in his business, and by threats induced his servants to leave his employment, and his

(*n*) *Garrett* v. *Taylor*, Cro. Jac. 567.
(*o*) *Allen* v. *Flood*, [1898] A. C. 1.
(*p*) [1901] A. C. 495.

customers to cease from doing business with him. They not only induced actual breaches of contract by their threats and intimidation, but they also conspired to injure him in his trade, and thereby did injure him. Art. 73.

(5) The subject of conspiracy, as a tort, presents many difficulties. It may be laid down generally that a combination of two or more persons to injure a man in his trade or calling by inducing his customers or servants to leave him, or to injure a workman by inducing employers not to employ him is unlawful, and if it results in damage to the person conspired against, is generally actionable at common law (*q*), but if done in contemplation or furtherance of a trade dispute, is protected by s. 1 of the Trade Disputes Act, 1906, provided the conspirators do nothing which would be actionable if done by one person alone. Conspiracy.

(6) And where persons combine together to further their own trade interests and increase their profits by inducing people to trade with them exclusively, this is not actionable if no unlawful means are used, although the combination, if successful, necessarily results in loss of trade to their rivals who are not within the combination (*r*).

ART. 74.—*Unlawfully Securing Custom.*

A trader who gets up, describes or marks his goods in such a way as would be calculated to deceive an ordinary purchaser into thinking they are the goods of another, so that he would be likely to secure part of the custom of that other, commits a tort, and is liable in damages or to be restrained by injunction.

Actions of this kind must not be confused with actions for infringement of trade marks, the right to enjoy which Comment.

(*q*) *Quinn* v. *Leathem*, [1901] A. C. 495; *Giblan* v. *Labourers Union*, [1903] 2 K. B. 600.

(*r*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25.

Art. 74.

is statutory. The wrongs we are now discussing are torts at common law for which an action can be brought for damages (*s*), though the remedy sought is generally an injunction in the Chancery Division.

Passing off goods as those of another.

Where a trader gets up his goods as those of another it is not necessary to prove that he does so fraudulently with intent to deceive, or that any one is in fact deceived. "All that it is necessary to prove is that the defendants' goods are so marked, made up, or described by them as to be calculated to deceive ordinary purchasers, and to lead them to mistake the defendant's goods for the goods of the plaintiffs" (*t*), for "no man can have any right to represent his goods as the goods of another person" (*u*).

Use of one's own name.

Generally speaking, a man may use his own name, even though his goods may in consequence be mistaken for those of another (*x*). So, if two members of a learned profession happen to have the same name each may use it, though the result may be that he gets some of the clients of the other. It is another matter when a person assumes a name which does not belong to him. He will be restrained from doing this, if his so doing would be calculated to deceive (*y*). And a man may even be restrained from using his own name, if it is clearly proved that he is using it with the **fraudulent intent** of attracting the custom of a rival, but not otherwise. For primâ facie a man has a right to use his own name (*z*).

Illustrations.

Make up of goods.

(1) Actions have been brought successfully by an inventor of metallic hones against another trader who wrapped his in envelopes resembling the plaintiff's (*a*); by the well-

(*s*) *Blofield* v. *Payne*, 4 B. & Ad. 410; *Rodgers* v. *Nowill*, 5 C. B. 109; *Reddaway* v. *Banham*, [1896] A. C. 199.

(*t*) *Per* LINDLEY, L.J., in *Reddaway* v. *Bentham Hemp Spinning Co.*, [1892] 2 Q. B. 639 [C. A.], at p. 644; "*Singer*" *Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376.

(*u*) *Per* HALSBURY, L.C., in *Birmingham Vinegar Brewery Co.* v. *Powell*, [1897] A. C. 710, at p. 711, quoting from TURNER, L.J., in *Burgess* v. *Burgess*, 3 D. M. & G. 204.

(*x*) *Turton* v. *Turton*, 42 Ch. D. 128 [C. A.].

(*y*) *F. Pinet et Cie* v. *Maison Louis Pinet, Limited*, [1898] 1 Ch. 179.

(*z*) *Burgess* v. *Burgess*, 3 D. M. & G. 896.

(*a*) *Blofield* v. *Payne*, 4 B. & Ad. 410.

known makers of pocket-knives, J. Rodgers & Sons, against another firm who used their name and device with the addition of the word "Sheffield" (*b*); by the well-known makers of sewing machines against rivals who advertised and sold "S" sewing machines, by which name the plaintiffs' machines were well known in the trade (*c*); by makers of "Yorkshire Relish" against another firm who sold sauce in similar bottles by the same name (*d*); and by brewers at Stone of a drink known as "Stone Ale," against another firm of brewers who also manufactured ale at Stone and sold it as "Stone Ale" (*e*). Art. 74.

(2) Though the plaintiffs had for many years carried on business as steel manufacturers under the style of Thomas Turton & Sons, it was held they could not prevent a firm consisting of John Turton and his two sons from carrying on a similar business under the name of John Turton & Sons, that being a true description of the firm, and there being no evidence of any attempt to deceive the public (*f*); but where a person assumed as his name the name of a manufacturer of boots and shoes with the object of making boots and shoes and passing them off as those of the old-established firm, he was restrained from using the name in connection with the sale of boots and shoes (*g*). Similarity of name.

(*b*) *Rodgers* v. *Nowill*, 5 C. B. 109.
(*c*) "*Singer*" *Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376.
(*d*) *Birmingham Vinegar Brewery Co.* v. *Powell*, [1897] A. C. 710.
(*e*) *Montgomery* v. *Thompson*, [1891] A. C. 217.
(*f*) *Turton* v. *Turton*, 42 Ch. D. 128 [C. A.].
(*g*) *F. Pinet et Cie* v. *Maison Louis Pinet, Limited*, [1898] 1 Ch. 179.

CHAPTER VI.

OF DECEIT OR FRAUD.

ART. 75.—*Definition of Fraud.*

Fraud consists of a false representation made with intent to deceive and to be acted upon, and either known by the party making it to be false, or made without belief in its truth, or recklessly without caring whether it be true or false.

The general rule of law is, that mere silence with regard to a material fact will not give a right of action for fraud.

Elements of fraud.

The elements of legal fraud are: (1) intentional deceit; (2) practised with intent to induce another to act upon it. For if it were otherwise, a man might sue his neighbour for any mode of communicating erroneous information; such, for example, as having a conspicuous clock too slow, since the plaintiff might thereby be prevented from attending to some duty, or acquiring some benefit (*a*).

Fraud followed by damage, as we shall see in the next Article, gives rise to an action for deceit. There must be **both fraud and damage.**

When silence amounts to fraud.

Though it is generally true to say that there must be active fraud, nevertheless there may be statements of a fragmentary character, true as far as they go, but so distorted as to convey a wholly erroneous impression; and statements of that kind made with intent to deceive may amount to fraudulent statements although literally true. "Supposing you state a thing partially, you make as much a false statement as if you misstated it altogether. Every

(*a*) *Barley* v. *Walford*, 9 Q. B. 197, *per* Lord DENMAN, C.J., at p. 208.

Art. 75.

word may be true, but if you leave out something which qualifies it, you make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report and leave out a third passage which qualifies them, that is an actual mis-statement" (*b*).

Actual fraud necessary.

The leading case of *Derry* v. *Peek* (*c*) establishes that, in an action of deceit, the plaintiff must prove actual fraud; he may prove it by showing that the false representation was made knowingly, or without belief in its truth, or recklessly, not caring whether it was true or false. But a false statement made through carelessness, and **without reasonable ground for believing it to be true, does not amount to fraud**; and if the jury finds that it was made in the *honest belief* that it was true, the defendant will not be liable in an action of deceit, however unreasonable his belief may have been. **No amount of negligence can amount to fraud.**

ART. 76.—*When an action will lie for Fraudulent Statements.*

(1) An action will lie, where, by reason of a representation fraudulently made by the defendant:

(a) The person to whom it was made has been induced to act to his loss (*d*); or has otherwise suffered loss which is the natural consequence of the fraudulent representation; or

(b) A third person has been so induced, if the representation was made with the direct intention that it should be communicated to him and he should so act (*e*).

(*b*) *Per* JAMES, L.J., in *Arkwright* v. *Newbold*, 17 Ch. D. 301, at p. 318.

(*c*) 14 App. Cas. 337; and see *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491 [C. A.].

(*d*) *Pasley* v. *Freeman*, 3 Term Rep. 51.

(*e*) *Langridge* v. *Levy*, 2 M. & W. 519.

Art. 76.

(2) Provided that where the fraudulent statement consists of a false representation as to the conduct, credit, ability or dealings of another, with intent to procure for him credit, money or goods, no action will lie unless the representation is in writing signed by the defendant (*f*).

Comment.

The elements of an action of deceit are: (1) fraud; (2) damage induced by the fraud.

As was said by BULLER, J., in *Pasley* v. *Freeman* (*g*): "Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies."

To whom made.

The fraudulent representation need not have been made directly to the person who acts upon it, and thereby suffers damage; provided it was made with the intention that he should act on it.

"It is now well established that in order to enable a person injured by a false representation to sue for damages it is not necessary that the representation should be made to the plaintiff directly: it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view of its being acted on and the plaintiff as one of the public acts on it and suffers damage thereby." (*h*).

Illustrations of fraud followed by damage.

(1) Thus, where one fraudulently misrepresents the amount of his business, and the person to whom such representation is made, acting on the faith thereof, purchases it and is damnified, an action of deceit will lie against the vendor (*i*). But a mere careless statement as to

(*f*) 9 Geo. 4, c. 14, s. 6. It will be observed that the signature must be that of the defendant himself, and not of an agent or partner (*Swift* v. *Jewsbury*, L. R. 9 Q. B. 301 [Ex. Ch.]; *Williams* v. *Mason*, 28 L. T. 232).

(*g*) 2 Sm. L. C. 68; 3 Term Rep. 51.

(*h*) *Per* QUAIN, J., in *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, at p. 253; and see *Richardson* v. *Silvester*, L. R. 9 Q. B. 34.

(*i*) *Dobell* v. *Stevens*, 3 B. & C. 623; *Smith* v. *Chadwick*, 9 App. Cas. 187.

Art. 76.

the profits, made honestly, but untrue in point of fact, gives no right of action (*k*).

(2) So, also, in *Peek* v. *Gurney* (*l*), Lord CAIRNS remarked: "I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misrepresentation of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

Misrepresentation in equity.

(3) Fraud giving rise to an action for deceit must not be confused with misrepresentation of a material fact, which though made negligently or quite innocently may, nevertheless, afford a ground in equity for rescinding a contract or refusing specific performance (*m*).

No intent to benefit.

(4) The false statement need not be made with intent to benefit the defendant. It is sufficient that it was made with intent to deceive, and was followed by loss which a reasonable man might have contemplated. Thus, where a foolish practical joker told the plaintiff that her husband had had both his legs smashed in a railway accident and that she was to go to him at some distance immediately with appliances for bringing him home, he was held liable for the nervous shock and subsequent ill-health of the plaintiff (*n*).

(5) Where a gunmaker sold a gun to B., for the use of C., fraudulently representing it to be sound, and the gun burst while C. was using it, and he was thereby injured:—*Held*, that C. might maintain an action of fraud against the gunmaker, as the statement with regard to the soundness of the

(*k*) *Glasier* v. *Rolls*, 62 L. T. 133 [C. A.]. (*l*) L. R. 6 H. L. 103.
(*m*) See *Redgrave* v. *Hurd*, 20 Ch. D. 1 [C. A.].
(*n*) *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57.

gun, though made to B., was intended to be acted upon, and was acted upon by C. (*o*). Art. 76.

(6) A principal is generally liable for the fraud of his agent or servant acting within the scope of his employment, and for his master's benefit (*p*), and in *Cornfoot* v. *Fowke* (*q*), the question arose whether a principal is liable for the act of his agent who makes, on behalf of his principal but without his authority, a false statement which he believes to be true, but which the principal would have known to be untrue. A house agent represented to an intending lessee that there was no objection to a house. There was, in fact, a brothel next door. The principal knew of this; the agent did not:—*Held*, the principal was not liable in an action of fraud. The agent was not fraudulent, because he did not know that the statement was untrue, and the principal had not himself committed a fraud, because he did not make the statement or authorise the agent to make it. How then could the principal be liable for a fraud which neither he himself nor his agent had committed? Fraud of agent. *Cornfoot* v. *Fowke*.

Where, however, a principal intentionally keeps an agent ignorant of a fact, intending that he shall misrepresent it, and the agent does so, the principal is liable for fraud. His conduct in that case is as fraudulent as if he had himself made the misrepresentation with knowledge of its falsity (*r*).

ART. 77.—*The Liability of Directors and Promoters of Companies.*

Directors and promoters of companies who are parties to the issuing of any prospectus inviting subscriptions to the shares, debentures or debenture stock of a company, are liable to persons who subscribe on the faith of such prospectus

(*o*) *Langridge* v. *Levy*, 2 M. & W. 519.

(*p*) *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259 [Ex. Ch.]. See Art. 27, *ante*.

(*q*) 6 M. & W. 358.

(*r*) *Ludgater* v. *Love*, 44 L. T. 694 [C. A.].

Art. 77. for untrue statements therein made **without reasonable ground** (*s*).

Comment. The decision in *Derry* v. *Peek* (*t*), that if a person issuing a prospectus had an honest belief in its truth, he could not be made liable in an action for deceit, however careless he may have been, and however slender the grounds of his belief, led to an amendment of the law by which Parliament created a statutory liability to pay compensation for untrue statements in prospectuses, **without proof of actual fraud,** unless the defendant had reasonable grounds for believing the statement to be true, or can establish one of the other defences allowed by the Act (*s*). It is now enacted that where a prospectus invites persons to subscribe for shares in, or debentures or debenture stock of, a company, every director and promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to persons who subscribe for any shares, debenture, or debenture stock, on the faith of such prospectus, for loss sustained by *any untrue statement* in the same, *unless it is proved either*—

(a) that the defendant had *reasonable ground to believe*, and did believe, that it was true; or

(b) that the statement fairly represented some statement in the report of an expert (whom the defendant believed to be competent), or in a public or official document; or

(c) that the prospectus was issued without the authority or consent of the defendant, and that he took the proper steps indicated in the Act to make this known (*s*).

It will be perceived that this statute really creates a new statutory duty, the breach of which is a tort, but that it makes no alteration in the common law action for deceit. In short, it makes directors and promoters liable for carelessness as well as for fraud (*u*).

(*s*) Section 84 of the Companies (Consolidation) Act, 1908, being a re-enactment of the Directors Liability Act, 1890.

(*t*) 14 App. Cas. 337.

(*u*) See *Dovey* v. *Cory*, [1901] A. C. 477; *Préfontaine* v. *Grenier*, [1907] A. C. 101 [P. C.].

CHAPTER VII.

OF NEGLIGENCE.

Art. 78.—*Definition.*

(1) Negligence consists in the omission to do something which a prudent and reasonable man would do, or the doing something which a prudent and reasonable man would not do (*a*).

(2) Negligence is actionable whenever, as between the plaintiff and the defendant, there is a duty cast upon the latter not to be negligent, and a breach of this duty which causes damage to the plaintiff (*b*).

It will be seen that there are three points to be established to found an action for negligence:

(i) A duty to take care.
(ii) A breach of that duty—negligence.
(iii) Damage as the natural and probable consequence.

Duty to take care.

The duty to take care arises out of many relations equally impossible of strict definition or of enumeration in a short compass.

Some of the typical cases are dealt with in the following articles, but the list is not exhaustive. It must not be forgotten, however, that though there is a vast variety of circumstances in which there is a duty to take care, where there is no duty there can be no action for negligence.

The student should refer back to Part I., Chapter III., where some of the cases in which it has been held that

(*a*) *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781, 784.
(*b*) See *per* Lord Herschell, *Caledonian Rail. Co.* v. *Mulholland*, [1898] A. C. 216, at p. 225.

Art. 78. there is no duty to take care are considered (*c*). Other cases will be found in the following Articles.

What is negligence.

It will be observed that negligence may consist in either misfeasance, *i.e.*, doing that which a prudent and reasonable man would not do; or in nonfeasance, *i.e.*, omitting to do something which a prudent and reasonable man would do. Negligence is judged by the standard of prudence of an ordinary reasonable man, and if a person omits some precaution which a person of ordinary intelligence and prudence would take, he is negligent, although he may himself honestly think it unnecessary to take such a precaution. So a person may be negligent in taking care of another's money entrusted to him for that purpose—though he takes as much care of it as he takes of his own (*d*).

Degree of care required depends on circumstances.

It must be remembered that the degree of care which a person is bound to use in regard to others is relative, and that in deciding whether a given act is, or is not, negligent, the circumstances attending each particular case must be fully considered. "A man," it has been said, "who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the things he carries. Such person would be bound to keep a better look out than the man who merely carried an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands."

Want of skill.

A person who undertakes something requiring special knowledge or skill is negligent if by reason of his not possessing that knowledge or skill he bungles, although he does his best.

So a person who drives a horse or a motor car is negligent if he does something which a prudent person having reasonable skill as a driver would not do: and a person

(*c*) See especially *Winterbottom* v. *Wright*, 10 M. & W. 109; *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; and *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491 [C. A.], *ante*, Art. 17; and *Caledonian Rail. Co.* v. *Mulholland*, [1898] A. C. 216.

(*d*) *Doorman* v. *Jenkins*, 2 A. & E. 256.

practising surgery without the ordinary skill and knowledge of a surgeon, is negligent if he blunders by reason of his want of knowledge and skill (*e*). Art. 78.

But no person is required to have extraordinary foresight, prudence or skill, and so long as one uses ordinary skill and acts with reasonable prudence, he cannot be said to be negligent.

So in the case of a solicitor, erroneous judgment upon a new point of law or upon a difficult question of construction, is not negligence, but ignorance of practice and mismanagement of the preparation of a case for trial is, for these are matters in which a solicitor of ordinary intelligence, and having that knowledge of his professional duties which all solicitors should have, ought not to make a mistake (*f*).

ART. 79.—*Duty of Persons using Highway to take Care.*

Every person using a highway or other place frequented by the public owes a duty to take care as regards the persons and property of others. So if a person driving or riding on a highway by his negligence runs over, or otherwise damages, another person on the highway an action will lie for the damage suffered. So, also, persons in charge of ships at sea or on rivers are bound to use care not to do damage to the persons or property of others (*g*).

NOTE.—This rule does not depend on the special nature of highways. It applies generally to all places where

(*e*) *Gladwell* v. *Steggall*, 5 Bing. N. C. 733.

(*f*) See *Godefroy* v. *Dalton*, 6 Bing. 460, 468.

(*g*) See the rule stated more broadly by Lord BLACKBURN in *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1206; and by Lord ESHER more broadly still in *Heaven* v. *Pender*, 11 Q. B. D. 503 [C. A.]. In the latter case COTTON and BOWEN, L.JJ., dissented from Lord ESHER'S proposition, and Lord ESHER himself explained it in *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 497 [C. A.].

Art. 79. persons are likely to meet others. As Lord BLACKBURN says: "Those who go personally or bring property where they know that they or it may come in collision with the persons or property of others, have by law a duty cast upon them to use reasonable care and skill to avoid such a collision" (*h*). So the rule applies equally to persons on railway stations, in shops, or any other places where people congregate.

ART. 80.—*Duty of Carriers of Passengers.*

Carriers of passengers by any sort of carriage or conveyance owe to passengers a duty to take reasonable care to carry them safely. This duty arises not from contract but from the fact that the passenger is being carried with the knowledge and consent of the carrier; and it applies whether the carriage is gratuitous or for reward (*i*), but not if the passenger is a mere trespasser (*k*).

NOTE.—This rule is the foundation of the liability of railway companies to their passengers. That the duty is one arising quite **independently of any contract** between the carrier and the passenger is laid down in *Kelly* v. *Metropolitan Rail. Co.* (*l*), and is well shown by the following illustrations. It must be noted that a carrier of passengers (unlike a common carrier of goods) does **not warrant** the safety of the passenger. He is only liable for negligence, and if an injury happens to the passenger **without negligence there is no liability** (*m*).

Illustrations. (1) An infant over three years of age whilst travelling by railway with its mother (with the knowledge and implied consent of the company's servants, but without a ticket) was injured by the negligence of the railway company. The

(*h*) *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1206.

(*i*) *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219.

(*k*) *Grand Trunk Rail. Co.* v. *Barnett*, [1911] A. C. 361 [P. C.]; *Lygo* v. *Newbold*, 9 Ex. 302.

(*l*) [1895] 1 Q. B. 944 [C. A.], explaining *Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134 [C. A.].

(*m*) *Readhead* v. *Midland Rail. Co.*, L. R. 4 Q. B. 379 [Ex. Ch.].

company were held liable though there was no contract to carry the infant (*n*). Art. 80.

(2) But where a person was injured whilst travelling on the footboard of a train in defiance of a byelaw and without the permission of the company, so that he was a mere trespasser, it was held that the company owed him no duty and he had no cause of action (*o*).

(3) A passenger in a railway train was injured in an accident caused by the breaking of the tyre of a wheel of the carriage in which he rode. The defendants had used all diligence in providing a safe carriage and examining it before starting and in the course of the journey. There being no negligence the company were not liable (*p*).

See also *Harris* v. *Perry & Co.* (*r*), cited *ante*, p. 41, Art. 18.

ART. 81.—*Duty of Occupiers of Land and Houses to Persons coming by Invitation, etc.*

(1) An occupier of land, buildings or structures owes to persons resorting thereto in the course of business upon his invitation, express or implied, a duty to use reasonable care to prevent damage from unusual danger of which he knows or ought to know (*s*).

(2) An occupier of land or buildings owes to bare licensees and guests a duty not to set a trap, *i.e.*, not to put any unexpected danger there without warning the licensee or guest (*t*).

The duty owed to persons coming in the course of business by invitation applies to all persons who go on Persons coming by invitation.

(*n*) *Austin* v. *Great Western Rail. Co.*, L. R. 2 Q. B. 442.
(*o*) *Grand Trunk Rail. Co.* v. *Barnett*, [1911] A. C. 361 [P. C.].
(*p*) *Readhead* v. *Midland Rail. Co.*, L. R. 4 Q. B. 379.
(*r*) [1903] 2 K. B. 219 [C. A.].
(*s*) *Indermaur* v. *Dames*, L. R. 1 C. P. 274; affirmed 2 C. P. 311 [Ex. Ch.].
(*t*) See *ibid.* and *Gautret* v. *Egerton*, L. R. 2 C. P. 371.

Art. 81.

business which concerns the occupier, or in which he is even indirectly interested. There need not be an express invitation. An invitation is implied when the persons come in the ordinary course of business. It will be noticed that the rule of liability does not throw on the occupier an absolute duty to insure the safety of the premises. So he is not liable for some latent defect in a structure which he did not know of and could not have provided against by taking reasonable care. It is only a duty to **use reasonable care to prevent damage from unusual danger**, *i.e.*, from dangers which would not usually be found on premises of the kind. Persons cannot complain of dangers which they would expect to find on premises of the kind.

Duty as between landlord and tenant.

As between landlord and tenant the duty to repair the demised premises depends entirely on the contract between the parties, and apart from contract the landlord owes the tenant no duty to repair or not to let the premises in a dangerous condition. Hence, if a landlord lets a house in a dangerous condition, he is not liable to the tenant or to a person using the premises by invitation of the tenant for any injuries happening during the term due owing to the defective state of the house (*u*).

Accordingly when a landlord contracted with his tenant to repair a defective house, but failed to do so, and the wife of the tenant was injured by reason of the defective state of the house, it was held that she had no cause of action, as she was a stranger to the contract (*x*).

So, too, when an owner of a building let out in flats or separate tenements keeps possession of the common staircase, he owes no duty to his tenants (apart from contract) with regard to lighting and repairing the staircase, and the guests of his tenants or persons coming on business with them have no better rights than the tenants themselves. Accordingly, if such a person is injured in consequence of

(*u*) *Lane* v. *Cox*, [1897] 1 Q. B. 415 [C. A.]. As to the implied warranty in the case of a letting of a *furnished* house, see *Smith* v. *Marrable*, 11 M. & W. 5 ; and *Wilson* v. *Finch Hatton*, 2 Ex. D. 336.

And as to the statutory obligation to repair in the case of small houses, see the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), ss. 14, 15.

(*x*) *Cavalier* v. *Pope*, [1906] A. C. 428.

Art. 81.

the dangerous condition of the staircase he has no cause of action against the landlord (*y*), unless the landlord has taken upon himself, by contract with the tenant, the obligation of repairing, in which event, as he must contemplate that the staircase will be used by persons having business with the tenants, he owes them a duty to keep it in a reasonably safe condition (*z*).

Licensees and guests.

Bare licensees, *i.e.*, persons who come not for any business in which the occupier is interested, but merely by permission for their own purposes, and guests, are in a somewhat different position. Their position is analogous to that of a person who receives a gift. He is only entitled to use the place as he finds it, and cannot complain, unless there is some design to injure him or the occupier has done some wrongful act, such as digging a trench on the land or misrepresenting its condition or anything equivalent to laying a trap for the unwary. A giver of a gift is not responsible for the insecurity of the gift unless he knows its evil character at the time and omits to caution the donee. So, too, in the case of a person to whom permission to go on land is given, he cannot complain unless there is something like fraud in the gift (*a*).

Trespassers.

Trespassers are at any rate in no better position than bare licensees, and, as no permission is given, there can be no duty to give warning of danger. But even a trespasser has a right of action if he is injured, whilst trespassing, by some wrongful act of the occupier, as for instance, if he is assaulted, or is injured by something which the occupier of the land has put there for the purpose of injuring him (*b*). And if a person knows that others are in

(*y*) *Huggett* v. *Miers*, [1908] 2 K. B. 278 [C. A]; and compare *Ivay* v. *Hedges*, 9 Q. B. D. 80. It is difficult to reconcile *Hargreaves, Aronson & Co.* v. *Hartopp*, [1905] 1 K. B. 472, with these cases.

(*z*) *Miller* v. *Hancock*, [1893] 2 Q. B. 177 [C. A.]. It is difficult to distinguish this case from *Cavalier* v. *Pope*, [1906] A. C. 428, and to see why if the wife in *Cavalier* v. *Pope* could not take the benefit of her husband's contract, the guest of the tenant in this case could take advantage of the tenant's contract with his landlord. In *Cavalier* v. *Pope*, the landlord must have contemplated that the house would be used by the wife. Perhaps *Miller* v. *Hancock* is bad law. See *Huggett* v. *Miers*, *supra*.

(*a*) See the judgment of WILLES, J., in *Gautret* v. *Egerton*, L. R. 2 C. P. 371.

(*b*) *Bird* v. *Holbrook*, 4 Bing. 628.

Art. 81.

the habit of trespassing or are likely to trespass, he may be liable if he leaves about dangerous things which will act as allurements and so induce people to trespass, and does not take proper means to prevent consequent damage (*c*).

The judgment of WILLES, J., in the two leading cases of *Indermaur* v. *Dames* and *Gautret* v. *Egerton*, should be carefully studied.

Illustrations: Persons coming by invitation.

(1) Upon the defendant's premises was a trap-door on the level of the floor used for raising and lowering bags of sugar from one floor to another. It was not necessary that it should be unfenced when not in use. The plaintiff, a journeyman gasfitter employed by persons who had fixed a gas regulator upon the defendant's premises, came to test the apparatus. Whilst so engaged he fell through the trap-door and was injured. The trap-door at the time was not in use and was not fenced. There was no negligence on his part:—*Held*, that he was on the premises on business in which the defendant was interested, and that the defendant was liable as the danger was an unusual danger, and the defendant had neglected his duty to take reasonable care by fencing it or warning the plaintiff (*d*).

(2) The plaintiff, a licensed waterman, having complained to the person in charge that a barge of the defendant's was being navigated unlawfully, was referred to the defendants' foreman. While seeking the foreman, he was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger:—*Held*, that the defendants were liable (*e*).

(3) The defendant engaged a contractor to erect a grand stand for viewing races. The plaintiff paid for a seat on the grand stand. Owing to the negligence of the contractor the stand was defective, and it fell and the plaintiff was injured. The defendant was liable, although neither he nor his servants were personally negligent. It was their duty to see that the stand was reasonably safe (*f*).

(*c*) *Cooke* v. *Midland Great Western Railway*, [1909] A. C. 229.

(*d*) *Indermaur* v. *Dames*, L. R. 1 C. P. 274; affirmed L. R. 2 C. P. 311 [Ex. Ch.].

(*e*) *White* v. *France*, 2 C. P. D. 308.

(*f*) *Francis* v. *Cockrell*, L. R. 5 Q. B. 184.

Art. 81.

(4) Workmen were allowed to cross a piece of vacant land to get to some docks. On this land were canals and bridges. One of the bridges was out of repair, and a workman when crossing by it fell into a canal and was drowned. In an action brought by his widow it was held that as the workman was a bare licensee he must take the place as he found it, and as there was no trap the defendant was not liable (*g*).

So, too, in *Hounsell* v. *Smyth* it was held that a person who, whilst crossing waste land by mere permission of the owner, fell into an unfenced quarry, had no cause of action (*h*).

(5) An owner of land had a private road for the use of persons coming to his house. He allowed a builder to use it, and the builder put on it a heap of slates. He left them there at night and did not light them. The plaintiff, who came along at night, drove into the heap and was injured. This amounted to a trap. The defendant held out the road as a safe and convenient access to his house and then placed (or allowed the builder to place) a dangerous obstruction in it (*i*).

(6) In *Lowery* v. *Walker* (*k*) the defendant was a farmer who put in a field a horse which he knew to be savage. The defendant had tacit permission to cross the field, and whilst doing so was bitten by the horse. This was in effect setting a trap.

Trespassers.

(7) If a person sets a spring gun on his land with the intention that it shall go off and cause injury to trespassers, he is liable for the intentional wrong so done. What he does really amounts to an assault (*l*). If he leaves dangerous things like guns about he must take proper precautions to prevent their doing damage (*m*); and *a fortiori* he is liable if he contrives that they shall do damage.

(*g*) *Gautret* v. *Egerton*, L. R. 2 C. P. 371.
(*h*) *Hounsell* v. *Smyth*, 7 C. B. (N.S.) 731.
(*i*) *Corby* v. *Hill*, 4 C. B. (N.S.) 556.
(*k*) [1911] A. C. 10.
(*l*) *Bird* v. *Holbrook*, 4 Bing. 628.
(*m*) See *Dixon* v. *Bell*, 5 M. & S. 198.

Art. 81.

(8) In *Cooke* v. *Midland Great Western Railway of Ireland* (*n*) the defendants had a turntable on land adjoining a highway, and to which there was easy access by a gap in the hedge. They knew children were in the habit of trespassing. Children got through the gap and were injured whilst playing with the turntable, which was left in a dangerous condition. Even if the children were to be regarded as trespassers the company were liable. For they left an allurement near a highway by which the children were allured into trespassing and playing with the dangerous machine. Probably they would not have been liable if they had not left the gap so as to make trespassing easy and left an allurement to induce the children to trespass. This almost amounted to an invitation.

ART. 82.—*Duty of Bailees of Goods.*

Bailees of all kinds, including carriers, owe to their bailors a duty to take care of the goods and chattels bailed. The degree of care required varies with the nature of the bailment (*nn*).

NOTE.—All kinds of bailees of goods and chattels are bound at least to take reasonable care of the goods bailed to them, though, generally speaking, greater care is expected of one who derives benefit from the bailment, such as a borrower of goods, or a pawnbroker or hirer, or a warehouseman who is paid for keeping them, than from one who has the custody of goods for the benefit of the bailor only, such as one who gratuitously undertakes their custody for the convenience of the owner (*o*).

The topic of the liability of carriers and other bailees for the safety of goods entrusted to them is too large to be dealt with fully in this Work, and it is only necessary here to refer the student to the cases cited in a previous Article,

(*n*) [1909] A. C. 229.
(*nn*) See *Coggs* v. *Bernard*, 1 Sm. L. C. 173.
(*o*) See *ante*, Art. 18.

which show that the liability is one in tort, arising by reason of the bailment and quite apart from contract (*p*). It must be remembered, however, that the liability of a bailee may be modified by contract between the parties, and where goods are carried under an express contract the common law liability of the bailee may be thereby much enlarged or curtailed. Art. 82.

At common law a common carrier, that is, a person who holds himself out as carrying on the business of carrying the goods of all and sundry from place to place, is liable for any loss of, or injury to, the goods unless he can show that the loss was due to the act of God or the King's enemies, or to some inherent vice or unfitness to be carried of the goods themselves. A carrier of goods by sea is under the same liability, as also is an innkeeper. The common law liability in all these cases has to some extent been modified by statute (*q*), and may always in any particular case be modified by agreement between the parties. Bailees who are under this special liability are sometimes (though not quite accurately) spoken of as "insurers." Common carriers.

ART. 83.—*Duty to take Precautions with regard to things Dangerous in themselves.*

(1) In the case of articles dangerous in themselves such as loaded firearms, poisons, explosives and other things *ejusdem generis*, there is a peculiar duty imposed on those who send forth, make or leave about such articles to take precautions that they shall not do damage to persons who may come in contact with them (*r*).

(*p*) See *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56 [C. A.]; and *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387.

(*q*) See notes to *Coggs* v. *Bernard* in 1 Sm. L. C. 173. As to innkeepers, see *Calye's Case* and notes in 1 Sm. L. C. 119.

(*r*) *Per* Lord DUNEDIN in *Dominion Natural Gas Co.* v. *Collins and Perkins*, [1909] A. C. 640, 646 [P. C.].

Art. 83.

(2) A person who without due warning supplies to others for use an instrument or thing which *to his knowledge*, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to the use of such instrument or thing is liable if damage is caused thereby (*s*).

(3) If damage is done by reason of the neglect of such precautions or warning, it is no excuse that the damage would not have happened but for the intermeddling of some third person, if such intermeddling is such as might naturally occur (*t*).

(4) But if the immediate cause of the damage is the conscious act of volition of some third person that is a defence, for no precaution can avail against such conscious act of volition (*t*).

Comment.

The first rule is applicable to all things dangerous in themselves, such as those above described. The nature of the precautions to be taken must necessarily depend on the circumstances. In some cases it would be proper and sufficient to give warning of the danger so as to put persons on their guard against dangers which are not apparent from the nature of the thing. The following illustrations will show the nature of the precautions which the courts have held requisite in different circumstances (see also the closely allied rules stated in Arts. 89—91). In most of these cases the immediate cause of the damage has been the intermeddling of a third person. This is no defence if such intermeddling is what would be naturally expected of a person who was unconscious of the danger or of the proper way to avoid it. "A loaded gun will not go off unless someone pulls the trigger, a poison is innocuous unless someone takes it, gas will not explode unless it is mixed with air and then a light is set to it"; yet in each

(*s*) *Per* COTTON and BOWEN, L.JJ., in *Heaven* v. *Pender*, 11 Q. B. D. 503, 517 [C. A.].

(*t*) See note (*r*), *ante*, p. 177.

Art. 83.

of these circumstances the liability has been enforced. It is, however, another matter if a third person finding a loaded gun consciously fires it off at someone, or if a person who has bought poison consciously takes it himself or administers it to someone else. In such cases the damage is not caused by the absence of precautions, but by the wrongful act of the person who fires the gun or administers the poison.

Illustrations.

(1) Where the defendant entrusted a loaded gun to an inexperienced servant girl, and she pointed and fired it at the plaintiff's son, wounding and injuring him, it was held that the defendant was liable. He had given directions that the priming should be removed so as to make the gun safe, but this was not done properly and the gun was left in a dangerous state; so the defendant was responsible (*u*).

(2) Where the defendant negligently compounded a hair wash of dangerous chemical ingredients, and a person using it, and for whose benefit it was bought, suffered injury, the defendant was held liable (*v*).

(3) Quite apart from any warranty or the terms of the contract of sale, the vendor of goods which have some dangerous quality of which he knows, but of which the purchaser cannot be expected to be aware, owes a duty to the purchaser to take reasonable precautions by warning him that special care will be requisite, and for damages resulting from breach of that duty an action lies. Thus, where the defendants sold a tin of chlorinated lime, **knowing that it was likely to cause danger** to a person opening it unless special care was taken, and the danger was not such as would be known by the purchaser, the defendants were held liable for damage caused to the plaintiff by opening the tin without taking proper precautions, in consequence of which there was an explosion and her eyes were injured (*w*). And there is a similar duty on the part of one gratuitously lending goods to another, for breach of which, followed by

(*u*) *Dixon* v. *Bell*, 5 M. & S. 198.

(*v*) *George* v. *Skivington*, L. R. 5 Ex. 1.

(*w*) *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155 [C. A.].

Art. 83. damages, an action will lie. Note, that in these cases it is essential to show knowledge of the defect on the part of the seller or lender. A person who does not make but merely sells a thing he does not know to be dangerous may be liable for breach of warranty to the buyer, but is not liable in tort to the buyer or to users of the thing (*x*).

(4) A railway company kept a turntable unlocked (and therefore dangerous to children) on their land close to a public road. The railway servants knew that children were in the habit of trespassing and playing with the turntable, and took no steps to prevent them from so doing or to lock the machine so as to prevent it being dangerous. A child between four and five years of age, playing with other children on the turntable, was seriously injured. The company was held liable as they should have taken precautions to prevent such an accident as was likely to happen, and did happen, to the child (*y*). So if a person leaves a cart unattended in the street and boys play with it, as is their nature, and one is injured, he may have a cause of action against the owner of the cart, although the action would not have happened but for the intermeddling of himself and his companions (*z*).

(5) A person who consigns to a common carrier is under an absolute duty not to consign to him for carriage goods which are dangerous to carry, without warning the carrier of their dangerous character, unless the carrier knows, or ought to know, the dangerous character of the goods; and if by reason of their dangerous character the carrier or his servants are injured the consignor is liable, although he does not himself know of the dangerous character of the goods (*a*).

(*x*) *Longmeid* v. *Holliday*, 6 Ex. 761; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145 [C. A.].

(*y*) *Cooke* v. *Midland Great Western Rail. Co. of Ireland*, [1909] A. C. 229.

(*z*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

(*a*) *Bamfield* v. *Goole and Sheffield Transport Co.*, [1910] 2 K. B. 94 [C. A.].

ART. 84.—*Contributory Negligence.* Art. 84.

(1) Though negligence, whereby actual damage is caused, is actionable, yet if the damage would not have happened had the plaintiff himself used ordinary care, the plaintiff cannot recover from the defendant.

(2) But where the plaintiff's own negligence is only remotely connected with the accident, and the defendant might by the exercise of ordinary care have avoided the accident, the plaintiff will be entitled to recover.

Radley v. *London and North Western Rail. Co.*

The rule of contributory negligence is well illustrated by the leading case of *Radley* v. *London and North Western Rail. Co.* (*b*). In that case the facts were these: The defendants were in the habit of taking full trucks from the siding of a colliery company and returning empty ones. Over this siding was a bridge belonging to the colliery company. One Saturday afternoon the company ran some trucks on the siding. One was loaded so high that it would not pass under the bridge. On the Sunday evening the company brought some more trucks and pushed forward those already on the siding. Finding something was holding the trucks, the engine driver put on more power and pushed till he got them on. It was the bridge which held the loaded truck, and the result was that the bridge was knocked down. Now, assuming that the colliery company were negligent in loading the truck so that it would not pass under the bridge, it does not follow that their negligence was an effective cause of the accident. It may be that if the engine driver had been prudent and reasonable he should have got out to see what was wrong, and so would have avoided the consequences of the colliery company's negligence. In this view of the facts it was held that the judge who tried the case was wrong in telling the jury that the plaintiffs (the colliery owners) must satisfy them that the accident happened *solely*

(*b*) 1 App. Cas. 754. See especially, *per* Lord PENZANCE, at p. 759.

Art. 84.

through the negligence of the defendants' servants, and that if both sides were negligent so as to contribute to the accident, the plaintiffs could not recover. He ought to have told them that if they thought **the engine driver might by ordinary care have avoided all accident** any previous negligence of the defendants would not preclude them from recovering.

Statement of the rule by WILLES, J.

The law on this point was thus summarised by WILLES, J.: "If both parties were equally to blame, and the accident *the result* of their joint negligence, the plaintiff could not be entitled to recover. If the negligence and default of the plaintiff was in any degree the *proximate cause* of the damage, he could not recover, however great may have been the negligence of the defendant. But that if the negligence of the plaintiff was only remotely connected with the accident, then the question was, whether the defendant might not, by the exercise of ordinary care, have avoided it" (*c*).

Illustrations. *Davies* v. *Mann.*

(1) Therefore, where the plaintiff left his ass with its legs tied in a public road, and the defendant drove over it, and killed it, he was held to be liable; for he was bound to drive carefully, and circumspectly, and **had he done so he might readily have avoided driving over the ass** (*d*).

Butterfield v. *Forrester.*

(2) But where the defendant negligently and wrongfully left a pole across a highway, and the plaintiff, by riding negligently, ran against it and was hurt, it was held that as, if he had used ordinary care, he might have seen the pole and avoided it, the accident was entirely due to his own negligence, and the defendant was not liable (*e*).

Joint negligence of plaintiff and defendant.

(3) But in all cases where two persons are negligent and the accident is the result of their joint negligence, neither can recover against the other. And so, in cases of collision between carriages, the question is, whether the sole effective cause of the disaster was the negligence of the defendant, or whether the plaintiff himself so far contributed to the disaster, by his own negligence, or want of common and ordinary care, that, but for his default in this respect, the

(*c*) *Tuff* v. *Warman*, 2 C. B. (N.S.) 740, 743; affirmed in Ex. Ch., 5 C. B. (N.S.) 573.

(*d*) *Davies* v. *Mann*, 10 M. & W. 546.

(*e*) *Butterfield* v. *Forrester*, 11 East, 60.

disaster would not have happened. In the former case he recovers, in the latter not. Art. 84.

Doctrine of identification

(4) For many years it was thought that where a person voluntarily engaged another person to carry him, he so identified himself with the carrier as to be precluded from suing a third party for negligence in cases where the carrier was guilty of contributory negligence (*f*). However, this doctrine was overruled by the House of Lords, in the case of *The Bernina* (*g*), and there is no longer any rule of law that the driver of an omnibus, or coach, or cab, or the engineer of a train, or the master of a vessel, and their respective passengers, are so far identified as to affect the latter with any liability for the former's contributory negligence (*h*).

Contributory negligence in infants.

(5) It was decided many years ago that, where the plaintiff is a child of tender years, it is not necessarily a good defence to an action of negligence to prove that he himself contributed to his injury. In that case the defendant left a cart unattended in the street. The plaintiff, a boy of seven, climbed into the cart to play, another boy led on the horse, and the plaintiff fell and was hurt. If he had been a grown man it would have been a good defence that the proximate cause of the accident was his own wrongdoing—but the court held that as much care cannot be expected of a boy as of a grown person—and the act of the plaintiff, considering his age, was not such as to disentitle him from recovering (*i*). This case and the later authorities show that what would amount to contributory negligence in a grown-up person, may not be so in a child of tender years (*k*).

Persons in charge of infants.

(6) It has been held that where an infant is incapable of taking care of himself, he cannot recover if the person in whose charge he was, was guilty of contributory negli-

(*f*) *Thorogood* v. *Bryan*, 8 C. B. 115.

(*g*) 13 App. Cas. 1.

(*h*) *Mathews* v. *London Street Tramways Co.*, 58 L. J. Q. B. 12.

(*i*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

(*k*) *Per* KELLY, C.B., *Lay* v. *Midland Rail. Co.*, 34 L. T. 30. See also *Harrold* v. *Watney*, [1898] 2 Q. B. 320 [C. A.]; *Jewson* v. *Gatti*, 2 T. L. R. 441 [C. A.]; and *Cooke* v. *Midland Great Western Rail. Co.*, [1909] A. C. 229.

Art. 84.

gence (*l*). But whether this is consistent with principle seems questionable. For the person in charge is not the agent of the child, but of its parent or guardian; and in other respects the case of *The Bernina* (*m*) would seem to apply.

ART. 85.—*Effective Cause.*

The negligence of the defendant must be an effective cause of the damage.

General principle.

As we have seen (*n*) wherever damage is a part of the cause of action, it must be shown that the damage complained of was the natural and probable result of the wrongful act. Illustrations will be found at pp. 18 and 19, many of which are cases of negligence.

Combined negligence of defendant and third party.

It sometimes happens that though the defendant was negligent, the real effective cause of the damage was either the negligence of the plaintiff or the negligence of a third person. The former is dealt with as one aspect of contributory negligence. It is well illustrated by *Butterfield* v. *Forrester* (*o*). When the immediate cause of the damage is the interference of *a third party*, it does not necessarily follow that the defendant is not liable. If the defendant's negligence is *an effective cause* of the damage, he is liable, although the damage would not have occurred but for the interference of a stranger (*p*). It is, in every case, a question of fact whether the negligence of the defendant was an effective cause of the damage or merely a remote cause (*q*).

Illustration.

So where the defendant had taken the plaintiff's horse under an agreement for agistment and put it into a field separated by a wire fence from a cricket field, and by the

(*l*) *Waite* v. *North Eastern Rail. Co.*, El. B. & E. 719 [Ex. Ch.].
(*m*) *Supra*, p. 183.
(*n*) *Supra*, Art. 5.
(*o*) *Supra*, p. 182.
(*p*) *Engelhart* v. *Farrant*, [1897] 1 Q. B. 243.
(*q*) *McDowall* v. *Great Western Rail. Co.*, [1903] 2 K. B. 331 [C. A.].

negligence of the defendant's servants a gate was left open and the horse escaped into the cricket field, it was held to be the natural consequence that the cricketers should proceed to drive the horse back into the defendant's field. Whilst being so driven back the horse hurt itself against the wire fence, and the defendant was held liable, as the negligence of his servants in leaving the gate open was an effective cause of the accident (*r*). Art. 85.

ART. 86.—*Onus of Proof.*

(1) The onus of proving negligence is on the plaintiff; and that of proving contributory negligence on the defendant (*s*).

(2) But where a thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things and using proper care, the accident itself affords primâ facie evidence of negligence (*t*).

(1) Thus, where a horse of the defendant suddenly bolted without any explainable cause, and, swerving on to the footpath, collided with and injured the plaintiff, it was held that the plaintiff had not produced any evidence of negligence sufficient to entitle him to recover. For it is no negligence to drive a horse along a public street, and horses will occasionally run away without any negligence of the driver (*u*). Runaway horse.

(2) So, also, the mere fact of a motor omnibus skidding on a greasy road is no evidence of negligence, for it is well Skidding omnibus.

(*r*) *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561.

(*s*) *Dublin, Wicklow, etc. Rail. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1169.

(*t*) *Scott* v. *London Dock Co.*, 3 H. & C. 596; *Byrne* v. *Boadle*, 2 H. & C. 722.

(*u*) *Manzoni* v. *Douglas*, 6 Q. B. D. 145.

Art. 86.

known that roads are often greasy and that motor omnibuses, however well constructed and designed, have a tendency to skid on slippery roads (*x*).

Accident capable of two explanations.

(3) So where the dead body of a man was found on the defendants' railway near to a level crossing, the man having been killed by a train which bore the usual head-lights but did not whistle, it was held, in an action by the widow, that there was no evidence of negligence on the defendants' part. For, as Lord HALSBURY said, "One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?" (*y*).

Accident primâ facie due to negligence.

(4) On the other hand, where a person was walking in a public street and a barrel of flour fell upon him from a window of the defendant's house, it was held sufficient primâ facie evidence of negligence to cast on the defendant the onus of proving that the accident was not attributable to his want of care. For barrels do not usually fall out of windows in the absence of want of care (*z*). And when a railway train was thrown off the line whereby the plaintiff (a passenger) was injured, and it appeared that the engine, the coaches and the line all belonged to the same company, it was held that there was a primâ facie case of negligence, as trains do not run off the line unless there is something wrong with the line, or the train, or the running of the train (*a*). In short, the question must always depend on the nature of the accident. In general, where an accident may be equally susceptible of two explanations, one involving negligence, and the other not, the plaintiff must

(*x*) *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652 [C. A.].

(*y*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41. See also *Davey* v. *London and South Western Rail. Co.*, 12 Q. B. D. 70 [C. A.].

(*z*) *Byrne* v. *Boadle*, 33 L. J. Ex. 13; *Scott* v. *London Dock Co.*, 3 H. & C. 596.

(*a*) *Carpue* v. *London and Brighton Co.*, 5 Q. B. 747.

give some evidence of want of care. But where the probability is that the accident could only have had a negligent origin, the presumption will be reversed. Art. 86.

ART. 87.—*Duties of Judge and Jury.*

Whether there is any evidence to be left to the jury from which negligence causing the injury complained of may be reasonably inferred, is a question for the judge.

It is for the jury to say whether, and how far, the evidence is to be believed, and whether, in fact, there was negligence which was the effective cause of the damage (*b*).

That is to say, the judge should not leave the case to the jury merely because there is a *scintilla* of evidence, but should rather decide whether there is any evidence from which negligence **may be reasonably** inferred, and then leave it to the jury to find whether upon that evidence negligence **ought** to be inferred (*c*).

ART. 88.—*Volenti non fit Injuria.*

(1) In an action of negligence it is a good defence that the plaintiff, with full knowledge and appreciation of the risk of danger from the defendant's negligence, voluntarily accepted the risk and exposed himself to the danger (*d*).

(*b*) *Metropolitan Rail. Co.* v. *Jackson*, 3 App. Cas. 193.
(*c*) *Ibid.*, at p. 197.
(*d*) *Smith* v. *Baker & Sons*, [1891] A. C. 325.

Art. 88.

(2) It is a question of fact, not of law, whether the plaintiff voluntarily incurred the risk, and the burden of proof is on the defendant (*e*).

NOTE.—This rule must be applied with caution. It does not mean that whenever a person knows there is a risk of being injured by another's negligence whilst doing something, he is incapable of recovering in an action if, nevertheless, he does the thing with knowledge of that risk. If it were so, no one could ever bring an action for damages resulting from an accident to a train in which he was travelling, or even for being run over in the street. For everyone who travels by train or walks in the streets knows he runs a certain amount of risk in so doing. But if a person knowing of a particular risk **voluntarily accepts that risk and takes the risk upon himself,** the rule applies. For instance, if a man seeing an express train coming along a line approaching a level crossing, chooses to cross the line in front of it, taking the chance of getting across in time, the rule would apply.

Situations of alternative danger.

Again, the rule does not apply where one person is put by another in a situation of alternative danger, that is to say, one in which he will be in danger if he sits still and in danger if he tries to escape. In such a case any injury he may sustain in taking the course which he thinks best in the circumstances, will be regarded as the consequence of his being wrongfully put in that situation and not of his own voluntary act (*f*).

So, in an action against a coach proprietor for so negligently driving his coach that the plaintiff, a passenger, was obliged to jump off the coach, whereby he broke his leg, Lord ELLENBOROUGH said: "To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach. It is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap

(*e*) *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q. B. 338 [C. A.].

(*f*) *Per* MONTAGU SMITH, J., in *Adams* v. *Lancashire and Yorkshire Rail. Co.*, L. R. 4 C. P. 739, 742; *The George and Richard*, L. R. 3 A. & E. 466.

Art. 88.

or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported" (*g*).

Doctrine applied.

When a workman in the employment of a contractor engaged by the defendants had to work in a tunnel rendered dangerous by the passing of trains, and after working there a fortnight was injured by a passing train, it was held that the workman, **having continued in his employment with full knowledge**, could not make the railway company liable for an injury arising from the **danger to which he had voluntarily exposed himself**, although the railway company were guilty of negligence (*h*).

Yarmouth v. *France*.

The application of the rule has arisen chiefly in questions between employers and workmen, and in a case of this kind (under the Employers' Liability Act), Lord ESHER, M.R., stated the rule in the following words: "It seems to me to amount to this, that mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring the workman within the maxim *Volenti non fit injuria*. If so, that is a question of fact" (*i*). And LINDLEY, L.J., added: "A workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it. . . . If nothing more is proved than that the workman saw the danger, and reported it, but on being told to go on went on as before, in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred" (*k*).

(*g*) *Jones* v. *Boyce*, 1 Stark. 493.

(*h*) *Woodley* v. *Metropolitan District Rail. Co.*, 2 Ex. D. 384.

(*i*) *Yarmouth* v. *France*, 19 Q. B. D. 647, and see *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q. B. 338.

(*k*) *Yarmouth* v. *France*, 19 Q. B. D. 647.

Art. 88.

Smith v. *Baker.*

So, too, when a workman, engaged in an employment not in itself dangerous, is exposed to danger arising from an operation in another department over which he has no control, the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has voluntarily accepted the risk (*l*).

Inapplicable to breach of statutory duty.

Moreover the defence is not available where the injury arises from breach of a statutory duty on the part of the employer for the benefit of the workman himself and others. An agreement on the part of the workman to waive the enforcement of such a duty would not be enforceable, and a workman cannot be taken to have consented to it (*m*).

(*l*) *Smith* v. *Baker & Sons*, [1891] A. C. 325.
(*m*) *Buddeley* v. *Earl Granville*, 19 Q. B. D. 423.

CHAPTER VIII.

LIABILITY FOR BREACH OF DUTY TO PREVENT DAMAGE FROM DANGEROUS THINGS AND ANIMALS.

ART. 89.—*The Rule in Fletcher* v. *Rylands* (*a*).

(1) The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape.

(2) He can excuse himself by showing—

(a) That the escape was owing to the plaintiff's default.

(b) That the escape was the consequence of the act of God, or (perhaps) the King's enemies.

(3) (*Semble*) It is no excuse that the escape was due to the act of a stranger.

(4) The rule does not apply—

(a) Where the person charged has not himself brought, collected or kept the thing on his land.

(*a*) L. R. 1 Ex. 265 [Ex. Ch.]; affirmed in the House of Lords, *sub nom. Rylands* v. *Fletcher*, L. R. 3 H. L. 330. The first paragraph of the Rule here given is quoted from the judgment of the Exchequer Chamber delivered by BLACKBURN, J. The other paragraphs are taken partly from that judgment and partly from later cases referred to in the explanatory note and illustrations. The case will be found with full notes in Smith's Leading Cases, Vol. I.

Art. 89.

(b) Where he has brought or collected and kept it not solely for his own purposes but wholly or in part for the benefit of the person who is damaged by its escape.

(c) If he has statutory authority for bringing, collecting or keeping it on his land.

(5) The defendant is only liable for the natural consequences of the escape.

Explanation

The famous case of *Fletcher* v. *Rylands* (*b*) is the leading authority on this rule—in fact, perhaps the first case in which the rule was laid down with precision, though it had been applied in many earlier cases. In a very early case the rule was succinctly stated by saying that it is the duty of a man to keep his own filth in his own ground (*bb*). In *Fletcher* v. *Rylands* the dangerous thing was a large body of water. The rule has also been applied to such things as electricity (*c*), yew trees (*d*), wire fencing (*e*), and sewage (*f*), and (with some modifications) is the foundation of the liability for damage done by animals and fire (*g*).

Principle of rule.

It must be observed that the liability in cases of this kind does not depend on negligence. In the leading case negligence was expressly negatived. The principle of the rule is that a person who brings on his land for his own purposes a thing of the kind mentioned in the rule, must keep it at his peril, and is liable for the consequences of escape however careful he has been to provide against it.

Excuses.

BLACKBURN, J., says: "He can excuse himself by shewing that the escape was owing to the plaintiff's default (*h*), or

(*b*) L. R. 1 Ex. 265; L. R. 3 H. L. 350.

(*bb*) *Tenant* v. *Goldwin*, 1 Salk. 360; 2 Lord Raym. 1089.

(*c*) *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A. C. 381 [P. C.].

(*d*) *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5.

(*e*) *Firth* v. *Bowling Iron Co.*, 3 C. P. D. 254.

(*f*) *Tenant* v. *Goldwin*, 2 Lord Raym. 1089; *Ballard* v. *Tomlinson*, 29 Ch. D. 115 [C. A.]; *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648 [C. A.].

(*g*) See Arts. 90, 91.

(*h*) See Art. 11, *ante*.

perhaps that the escape was the consequence of *vis major*, or the act of God." We have substituted the more familiar expression "Act of God or the King's enemies," the expression used by MELLISH, L.J., in *Nichols* v. *Marsland* (*i*), which case shows that the act of God is a good excuse. "Act of God" and "*vis major*" seem to be equivalent expressions (*k*). It is still an open question whether it is an excuse that the escape was caused by the intervening voluntary act of a third person. The question is discussed in several cases, and it has been decided that in the case of savage animals this is no excuse (*l*). Possibly, if third persons came in force and let loose the dangerous substance, that might be a good excuse, though it would not be the act of God or the King's enemies. Art. 89.

As to justification by *statutory authority*, see Art. 10, *ante*.

(1) The plaintiff was the lessee of mines. The defendant was the owner of a mill, standing on land adjoining that under which the mines were worked. The defendant desired to construct a reservoir, and **employed competent persons** to construct it, so that there was *no negligence*. The plaintiff had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts communicating with the land above, which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. Shortly after the water had been introduced into the reservoir it broke through some of the vertical shafts, flowed thence through the old passages, and finally flooded the plaintiff's mine. The gist of the action was the collecting of the water and *not keeping it from escaping*, and whether this was the result of negligence, or whether it was the **result of a latent and undiscovered defect in the engineering works**, was quite immaterial (*m*). Illustrations. *Rylands* v. *Fletcher*.

(*i*) 2 Ex. D. 1 [C. A.], at p. 5.

(*k*) Pollock on Contract, 8th ed., p. 435, note (*s*), "Act of God = *vis major* = *θεοῦ βία*," and see *Nugent* v. *Smith*, 1 C. P. D. 423, 429 [C. A.].

(*l*) *Baker* v. *Snell*, [1908] 2 K. B. 825 [C. A.].

(*m*) *Fletcher* v. *Rylands*, L. R. 1 Ex. 265 [Ex. Ch.].

Art. 89.

Act of God.

(2) On the defendant's land were artificial pools containing large quantities of water. These pools had been formed by damming up, with artificial embankments, a natural stream, which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools by successive weirs into its original course. An *extraordinary* rainfall caused the stream and the water in the pools to swell, so that the artificial embankment was carried away by the pressure, and the water in the pools, being suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the pools, and that the flood was so great that it **cou d not reasonably have been anticipated**. The court found that this was in substance a finding that the escape of the water was caused by the *act of God* or *vis major*, and that accordingly the defendant was not liable (*a*).

Box v. *Jubb*.

Third party bringing thing on to defendant's land.

(3) And so again where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it, and damage was done to the plaintiff, it was held that the defendant was not liable; for the overflow was not caused by anything which he had done, nor had he any reasonable means of preventing it. As POLLOCK, B., said: "Here this *water has not been accumulated by the defendants*, but has come from elsewhere and added to that which was properly and safely there. For this the defendants . . . cannot be held liable" (*b*).

Escape of water falling on land.

(4) It has been held that this rule does not apply where the water which escapes has accumulated on the defendant's land by *natural causes*, and the defendant has done nothing to cause it to accumulate (*c*), and has taken no active means to cause it to escape on to his neighbour's land (*d*).

(*a*) *Nichols* v. *Marsland*, 2 Ex. D. 1 [C. A.].

(*b*) *Box* v. *Jubb*, 4 Ex. D. 76.

(*c*) *Wilson* v. *Waddell*, 2 App. Cas. 95; and see *Fletcher* v. *Smith*, 2 App. Cas. 781.

(*d*) *Whalley* v. *Lancashire and Yorkshire Rail. Co.*, 13 Q. B. D. 131 [C. A.].

Art. 89.

(5) The defendant was owner of a house which he let out in floors to separate tenants. The different floors were supplied with water from a cistern at the top of the house. One of the supply pipes burst and the plaintiff's tenement, in the basement, was flooded. As the defendant had stored the water for the benefit of the plaintiff (along with the other tenants) he was not liable in the absence of negligence (*e*). And the same rule applies where water is stored partly for the plaintiff's benefit and partly for the defendant's (*f*). Not for his own purposes.

(6) In an Indian case it was held by the Privy Council that the rule had no application to a case where the defendant had stored water in a tank in pursuance of an ancient custom and for the general benefit of the district (*g*).

(7) If a person plants on his own land yew trees and they grow so that the branches project over his neighbour's land, and his neighbour's horses and cattle eat of them and are poisoned, the person planting the yew trees is liable for this natural consequence of their escape (*h*). But he is not liable if his neighbour's cattle stray on to his land and eat them; for it is his neighbour's duty to keep his cattle from straying (*i*). Nor is he liable if he **has not planted them** on his land and clippings escape on to his neighbour's land without his knowledge (*k*). So also a person is not liable for the escape from his land of thistle seeds, when the thistles have grown naturally on his own land (*l*). Yew trees and thistles.

(*e*) *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602 [C. A.].

(*f*) *Carstairs* v. *Taylor*, L. R. 6 Ex. 217; *Whitmores Edenbridge, Limited* v. *Stanford*, [1909] 1 Ch. 427.

(*g*) *Madras Rail. Co.* v. *Zemindar of Carvatenagaram*, L. R. 1 Ind. App. 364.

(*h*) *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5, explaining *Wilson* v. *Newberry*, L. R. 7 Q. B. 31.

(*i*) *Ponting* v. *Noakes*, [1894] 2 Q. B. 281.

(*k*) *Wilson* v. *Newberry*, L. R. 7 Q. B. 31.

(*l*) *Giles* v. *Walker*, 24 Q. B. D. 656.

Art. 90.

ART. 90.—*Damage by Animals.*

(1) A person who keeps a **wild animal** or a **domestic animal known by him to be vicious** keeps it at his peril, and is liable for all the natural consequences of his not keeping it securely, such as attacks on mankind, even though the immediate cause of the mischief is the intervening act of a third person (*m*).

(2) A person who keeps a *dog* is liable for any injury it causes to cattle, sheep, horses, etc., although he does not know it has any propensity to attack them (*n*).

(3) A person who keeps a dog or other domestic animal is not liable for the consequences of its attacking mankind unless he keeps it with knowledge that it has a propensity to attack mankind (*o*).

Explanation. Animals are of two kinds in law:

(i) **Wild animals**, *i.e.*, animals which are not ordinarily kept in captivity in this country.

This class includes elephants (*p*), bears (*q*), monkeys (*r*), and doubtless many others. These animals a man keeps at his peril, whether or not he knows that the particular specimen is dangerous.

(ii) **Domestic animals**, including dogs (*s*), horses (*t*), bulls (*u*), rams (*v*), and others.

(*m*) *Filburn* v. *People's Palace*, 25 Q. B. D. 258 [C. A.]; *Baker* v. *Snell*, [1908] 2 K. B. 825.

(*n*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (1).

(*o*) *Cox* v. *Burbidge*, 13 C. B. (N.S.) 430; *Osborne* v. *Chocqueel*, [1896] 2 Q. B. 109.

(*p*) *Filburn* v. *People's Palace*, 25 Q. B. D. 258.

(*q*) *Besozzi* v. *Harris*, 1 F. & F. 92.

(*r*) *May* v. *Burdett*, 9 Q. B. 101.

(*s*) *Baker* v. *Snell*, [1908] 2 K. B. 825.

(*t*) *Cox* v. *Burbidge*, 13 C. B. (N.S.) 430.

(*u*) *Hudson* v. *Roberts*, 6 Ex. 697.

(*v*) *Jackson* v. *Smithson*, 15 M. & W. 563.

Art. 90.

These animals are not, in theory of law, necessarily dangerous, and an owner does not keep them at his peril, unless in the particular case he knows the animal is dangerous. If he knows the animal is dangerous he keeps it at his peril just as if it were a wild animal.

The gist of the action is the keeping of the animal with knowledge that it is dangerous. No negligence need be proved (*x*).

Scienter.

Knowledge of the savage character of an animal is usually called *scienter*. The plaintiff in suing for damages for a bite of the defendant's dog must always prove *scienter*. If he does not he will fail. In the case of dogs, it is usually proved by evidence that the dog has, to the knowledge of the defendant, on a previous occasion bitten or attempted to bite a human being (*y*). It may be proved in other ways, as, for instance, by evidence that the defendant had told people "to beware of the dog" (*z*). It must be proved that the dog was known to be "**accustomed to bite mankind.**" Accordingly it is not enough to prove a previous tendency to bite other animals — for an animal may be disposed to bite other animals and yet not savage *qua* human beings (*a*).

It has been held that, if the owner of the dog appoints a servant *to keep it*, the servant's knowledge of the animal's disposition is the knowledge of the master, for it is knowledge acquired by him in relation to a matter within the scope of his employment (*b*).

Dogs Act, 1906.

At common law an action did not lie against an owner of a dog which bit or worried sheep or cattle, without proof of *scienter*. But now this is altered by statute (*c*), and the owner is liable in damages for injury done to any cattle,

(*x*) *May* v. *Burdett*, 9 Q. B. 101; *Baker* v. *Snell*, [1908] 2 K. B. 825 [C. A.]; *Jackson* v. *Smithson*, 15 M. & W. 563.

(*y*) A proof of an *attempt* to bite is enough (*Worth* v. *Gilling*, L. R. 2 C. P. 1).

(*z*) *Judge* v. *Cox*, 1 Stark. 285; *Hudson* v. *Roberts*, 6 Ex. 697.

(*a*) *Osborne* v. *Chocqueel*, [1896] 2 Q. B. 109.

(*b*) *Baldwin* v. *Casella*, L. R. 7 Ex. 325.

(*c*) Dogs Act, 1906 (6 Edw. 7, c. 32), ss. 1, 7, repealing and (on this point) re-enacting the Dogs Act of 1865 to the same effect.

Art. 90.

horses, mules, asses, sheep, goats or swine, and it is not necessary to prove the previous mischievous propensity of the dog.

Bulls.

Scienter must be proved even in the case of such animals as bulls and rams, though it is well known that they are often dangerous; but no proof of *scienter* is necessary where a human being is attacked by the usually harmless elephant. He is in contemplation of law a wild animal which any person keeps at his peril (*d*).

Animals straying on to highway.

Though it is the duty of an owner of a domestic animal to keep it on his own land, and he may be liable if it escapes on to a highway for such damage as an animal of the kind would be likely to do, yet he is not liable for all the consequences of its escape. Thus, if a horse not known to be dangerous escapes, the owner will not be liable for the biting or kicking a human being (*e*).

So, too, where a fowl straying on a highway was frightened by a dog, and flew into the spokes of the wheel of a passing bicycle, and the bicyclist was thereby thrown and injured, it was held that this was **not** a natural consequence of the straying of a fowl (*f*).

Animals straying from highways.

It may be added that where a person is lawfully using a public highway for driving an animal, he is not under an absolute liability to prevent it from straying. If without negligence on his part it leaves the highway and does damage to an adjoining owner's land, he is not liable; for, though a man must keep his animals from trespassing from his own land on to his neighbour's, there is no obligation on persons using a highway to fence it, and the owner of land adjoining a highway must protect himself (*g*). Of course this will not justify wilful trespass, or even negligence in allowing animals to trespass from a highway.

(*d*) *Filburn* v. *People's Palace*, 25 Q. B. D. 258.

(*e*) *Cox* v. *Burbidge*, 13 C. B. (N.S.) 430.

(*f*) *Hadwell* v. *Righton*, [1907] 2 K. B. 345; and compare *Higgins* v. *Searle*, 100 L. T. 280 [C. A.], damage resulting from a sow's fright at the horn of a passing motor.

(*g*) *Tillett* v. *Ward*, 10 Q. B. D. 17. The owner of cattle straying on to land is bound to remove them within a reasonable time, *i.e.*, reasonable in all the circumstances (*Goodwyn* v. *Cheveley*, 4 H. & N. 631).

Art. 90.

Trespass by domestic animals.

There is a duty on a man to keep his cattle in; and if they stray on another's land he is liable in trespass for the natural and direct consequences of their so doing. So, if a horse gets out of a field through a defective fence and trespasses on another's land, the owner is liable even for damage it does by kicking another horse, that being a natural consequence of the trespass (*h*). And even if a horse merely kicks another **through a fence**, the owner may be liable, as it is a trespass even to put one foot over the boundary of another's land (*i*). As between two adjoining owners of land there may, however, be a duty imposed on one by grant or prescription to fence for the benefit of the other. If animals stray by reason of a neglect of this duty such straying is not actionable (*j*).

Liability to trespassers.

In *Lowery* v. *Walker* (*k*), it was held in the Court of Appeal that an occupier of land who kept on it a horse which he knew was bad tempered and prone to bite, was **not liable to a trespasser** who was bitten. In the House of Lords the decision was reversed on the ground that the plaintiff was not a trespasser; but the decision in the Court of Appeal seems to be sound, on the assumption that the plaintiff was a trespasser. If it were not so, no farmer could safely keep a savage bull. But towards licensees the general proposition applies, and the owner is bound to secure them from injury by an animal which he knows to be savage.

Baker v *Snell*.

In *Baker* v. *Snell* (*l*), the plaintiff was a housemaid in the employment of the defendant, a licensed victualler. The defendant kept upon his premises a dog which was **known by him to be savage.** It was the duty of the potman to let the dog out early in the morning and chain it up again before the barmaids came downstairs. On one occasion the potman brought the dog into the kitchen, and said: "I will bet the dog will not bite anyone in the room." He

(*h*) *Lee* v. *Riley*, 18 C. B. (N.S.) 722.
(*i*) *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10.
(*j*) See *Boyle* v. *Tamlyn*, 6 B. & C. 329.
(*k*) [1910] 1 K. B. 173 [C. A.]; reversed, [1911] A. C. 10.
(*l*) [1908] 2 K. B. 352, 825 [C. A.].

Art. 90.

then let it go, and said: "Go it, Bob." The dog flew at the plaintiff and bit her. Thus the immediate cause of the mischief was the voluntary act of the potman. It was held (1) that if the potman's wrongful act was within the scope of his employment as the defendant's servant, or was a mere neglect of his duty to keep the dog safe, the defendant would be liable on that ground (*m*); (2) that in any case the defendant was liable. Even if the potman was to be regarded as a stranger and not as the defendant's servant, the defendant was liable, as a person keeping an animal known by him to be savage is responsible for the damage it does, **even though the immediate cause of the injury is the intervening act of a third person.**

It must not be assumed that this case decides that, in cases within Art. 89, the defendant is liable where the immediate cause of the mischief is the intervening act of a third person. That point is still open (*n*).

ART. 91.—*Duty to keep Fire from doing Mischief.*

(1) If a person **intentionally** makes a fire on his land he must see that it does no harm to others and answer the damage if it does (*o*).

(2) If a person **by his negligence** allows a fire to arise on his land he is liable if it spreads to his neighbour's land and does damage (*p*).

(3) If a fire **accidentally** arises on a person's land and it spreads without negligence on his part he is not answerable (*q*).

(*m*) See *ante*, Art. 27.

(*n*) See *Baker* v. *Snell*, [1908] 2 K. B. 352, 825 [C. A.], especially *per* CHANNELL, J., p. 353, and KENNEDY, L.J., p. 834.

(*o*) *Tubervil* v. *Stamp*, 1 Salk. 13.

(*p*) *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; *Filliter* v. *Phippard*, 11 Q. B. 347.

(*q*) Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 86, not limited to the metropolis. See *Filliter* v. *Phippard*, 11 Q. B. 347.

Art. 91.

(4) Where a person brings fire into dangerous proximity to another's land **without statutory authority** he does so at his peril, and is liable if it does damage. If he has statutory authority he is only liable if the damage results from negligence in using his statutory powers (*r*).

Explanation.

Fire is obviously a thing which, if not kept within bounds, may do great mischief, and the common law rule seems to be that a person lights any fire on his land or in his house **at his peril**; though he is not liable for damage done by a fire which begins accidentally (*i.e.*, without negligence) or is lighted by a third person.

Illustrations.

In *Vaughan* v. *Menlove* (*p*), the defendant so negligently made a hay rick near the boundary of his land, that it took fire of itself, and the fire spread on to his neighbour's land and set fire to his corn and farm buildings. He was held liable in negligence.

So, too, where a farmer made fires on his land in a high wind and the fires spread on to his neighbour's land and did damage, he was held liable, either for negligence, or on the ground that he intentionally lighted the fires and so was responsible for the damage (*s*).

Liability of railway companies.

A person who, without statutory authority, uses a steam engine on a highway or a railway, is liable for all damage done by escaping sparks setting fire to crops, etc., quite apart from negligence. He uses the fire at his peril (*t*). But railway companies which have statutory authority for using locomotives are, as we have seen, protected by their statutory authority from this absolute liability, and are, at common law, not liable for fires caused by sparks without

(*r*) *Jones* v. *Festiniog Rail. Co.* L. R. 3 Q. B. 733; *Powell* v. *Fall*, 5 Q. B. D. 597 [C. A.]; *Smith* v. *London and South Western Rail. Co.*, L. R. 6 C. P. 14 [Ex. Ch.].

(*s*) *Filliter* v. *Phippard*, 11 Q. B. 347; and see *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48 [P. C.].

(*t*) *Jones* v. *Festiniog Rail. Co.* L. R. 3 Q. B. 733; *Powell* v. *Fall*, 5 Q. B. D. 597.

Art. 91.

negligence (*u*). But they are liable if they cause fires by their negligence (*x*).

Railway Fires Act, 1905.

By the Railway Fires Act, 1905 (*y*), railway companies are made responsible for damage done to agricultural land or agricultural crops by fire arising from sparks from locomotive engines, **notwithstanding that the engine is used with statutory authority,** provided the claim for damage does not exceed £100. Railway companies are by the same Act given powers of entering on land for the purpose of extinguishing or arresting fire, and of doing certain things to diminish the risk of fire.

(*u*) *Vaughan* v. *Taff Vale Rail. Co.*, 5 H. & N. 679 [Ex. Ch.].

(*x*) *Smith* v. *London and South Western Rail. Co.*, L. R. 6 C. P. 14 [Ex. Ch.].

(*y*) 5 Edw. 7, c. 11.

CHAPTER IX.

LIABILITY OF EMPLOYERS FOR INJURIES TO THEIR SERVANTS AND WORKMEN.

SECTION I.—COMMON LAW LIABILITY.

We have seen (*ante*, Art. 27) that generally a master is liable for the negligence of his servants committed in the course of their employment; but the liability of a master **to his servant** for an injury resulting from the negligence of a fellow-servant, differs materially from his liability **to a third party** for a similar injury, by reason of the common law rule that a master is not so liable where the injurer and the injured are the servants of a common master in a common employment, and the injury was inflicted in the course of that employment.

Common employment.

This rule, known as the doctrine of common employment, was founded on the idea that the servant takes all the risks incident to his employment as part of the contract of service. With regard to servants generally it still exists, but with regard to certain classes of servants Parliament has of late years made large exceptions to it (1) by the Employers' Liability Act, 1880, and (2) by the Workmen's Compensation Act, 1906. **The Employers' Liability Act, 1880, does not abolish the doctrine of common employment,** but it gives a remedy by action for damages in certain specific cases to servants who are injured by the negligence of their fellow-servants in the course of their employment.

Employers' Liability Act.

Workmen's Compensation Act.

The **Workmen's Compensation Act does not abolish the doctrine of common employment or repeal the Employers' Liability Act,** but it gives to all servants to whom it applies a statutory right to be compensated by their masters for accidents suffered by them in the course of and arising out of their employment, whether such accidents are caused

by the negligence of a fellow-servant or not. In other words, it gives to servants to whom it applies a right to compensation quite independent of any tort whatever. Its consideration, therefore, does not fall strictly within the scope of this work. But the importance of the subject is such that the student may reasonably expect to find some account of the Act and its main provisions.

ART. 92.—*The Doctrine of Common Employment.*

(1) A master is not liable to his servant for damage resulting from the negligence or unskilfulness of his fellow-servant in the course of their common employment.

(2) The doctrine only applies when there is both a common master and common employment under that master.

(3) Common employment does not necessarily imply that both servants should be engaged in the same or even similar acts, or in the same grade of employment, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which must be contemplated as incident thereto (*a*).

(4) A master who is personally negligent is liable to his servant for damage resulting from such negligence; and such negligence may consist in—

(a) employing another servant knowing him to be incompetent or without making proper inquiries as to his competence (*b*);

(*a*) *Morgan* v. *Vale of Neath Rail. Co.*, L. R. 1 Q. B. 149 [Ex. Ch.]; *Allen* v. *New Gas Co.*, 1 Ex. D. 251.

(*b*) *Tarrant* v. *Webb*, 18 C. B. 797.

Art. 92.

(b) retaining in his employment a servant whom he knows to be habitually negligent (*c*);

(c) allowing the premises, plant or machinery to be in a dangerous condition, when he knew or might have known they were dangerous (*d*);

(d) breach of an absolute unqualified duty imposed upon the employer by statute to do something for the protection of workmen (*e*).

Explanation of rule.

The rule was first established in *Priestley* v. *Fowler* (*f*). In that case a butcher's man was ordered to deliver meat from a van. The van was overloaded by the negligence of a fellow-servant, in consequence of which it broke down and the butcher's man was hurt. The master was held not liable.

It was further established in *Hutchinson* v. *York, Newcastle and Berwick Rail. Co.* (*g*), in which it was held that where a servant of a railway company in discharge of his duty as such was proceeding in a train under the guidance of other servants of the company, through whose negligence a collision took place, and he was killed, his personal representatives had no cause of action. The foundation of the doctrine is "that, under the circumstances, the injured person must be taken to have accepted the risks involved by putting himself in juxtaposition with other persons employed by the same employer, whose presence is incidental to the occupation in which he is engaged, and cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself" (*h*).

(*c*) See *Senior* v. *Ward*, 28 L. J. Q. B. 139.

(*d*) *Williams* v. *Birmingham Battery, etc. Co.*, [1899] 2 Q.B. 338 [C.A.].

(*e*) *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402 [C. A.]. See *Watkins* v. *Naval Colliery Co.*, [1911] 2 K. B. 162 [C. A.].

(*f*) (1837), 3 M. & W. 1. (*g*) (1850), 5 Ex. 343.

(*h*) *Per* COLLINS, M.R., in *Burr* v. *Theatre Royal, Drury Lane, Limited*, [1907] 1 K. B. 544 [C. A.], at p. 554.

Art. 92.

Illustrations. Common employment.

(1) The driver and guard of a stage-coach; the steersman and rowers of a boat; the man who draws the red-hot iron from the forge, and the man who hammers it into shape; the person who lets down into, or draws up from, a pit the miners working therein, and the miners themselves; all these are fellow-servants within the meaning of the doctrine (*i*); and so are the captain of a ship and the sailors employed under him (*j*); and the scene-shifter and the chorus girl engaged to sing in a pantomime (*k*).

(2) In *Morgan* v. *Vale of Neath Rail. Co.* (*l*), the plaintiff was in the employ of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turntable, so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown to the ground and injured. It was held, however, that he could not recover against the company; on the ground, that whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to that employment.

(3) Where a workman was, after his day's work was done, going home in a train which the colliery company ran voluntarily for the convenience of the colliers and was killed by the negligence of a servant of the company employed in mending a bridge, it was held that the collier and the other were in common employment, though the accident happened whilst the deceased was not being actually employed, as he must be deemed to have undertaken the risk of such an accident (*m*).

(*i*) *Barton's Hill Coal Co.* v. *Reid*, 4 Jur. (N.S.) 767 [H. L.].

(*j*) *Hedley* v. *Pinkney & Sons Steamship Co.*, [1892] 1 Q. B. 58 [C. A.].

(*k*) *Burr* v. *Theatre Royal, Drury Lane, Limited*, [1907] 1 K. B. 544.

(*l*) L. R. 1 Q. B. 149 [Ex. Ch.].

(*m*) *Coldrick* v. *Partridge, Jones & Co.*, [1909] 1 K. B. 530 [C. A.].

Art. 92.

Common master but not common employment.

(4) But when a collision occurred between two steamships belonging to the same owners, it was held that the crew of ship A. were not in common employment with the crew of ship B. (although employed by the same masters), so as to protect the owners from liability to the crew of ship A. for the negligence of their servants, the crew of ship B. (*n*).

Common employment but not common master.

(5) Where one of two railway companies has the user of the other's station, but not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply, for the men though in common employment are not in the employment of a common master (*o*).

(6) And so the rule does not apply where one servant is the servant of a contractor, and the other is the servant of the person who employs the contractor; for the servant of the contractor is not the servant of the contractor's employer; or where the person injured is a servant of one contractor, and the person by whose negligence he is injured is the servant of another contractor (*p*).

Personal negligence of master.

(7) Whilst a workman was in the course of his employment descending from an elevated tramway belonging to his employers his foot slipped and he fell to the ground and received injuries. His employers had provided no ladder or other safe means of descending from the tramway. In an action brought against the employers it was proved that it was dangerous to descend without a ladder, and that the employers knew this, and knew there was no ladder. On this it was held they were liable for personal negligence. If proper appliances had been provided and they had got out of order without the knowledge of the employers they would not have been liable (*q*).

(*n*) *The Petrel*, [1893] P. 320.

(*o*) *Warburton* v. *Great Western Rail. Co.*, L. R. 2 Ex. 30; *Swainson* v. *North Eastern Rail. Co.*, 3 Ex. D. 341 [C. A.].

(*p*) *Johnson* v. *Lindsay*, [1891] A. C. 371.

(*q*) *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338 [C. A.].

Art. 92.

(8) A workman was injured in consequence of a breach by his employer of the statutory duty to maintain fencing for dangerous machinery, imposed by the Factory and Workshop Act, 1878. For the breach of this absolute duty he had a right of action, and it was no defence that the defect in the fence was due to the negligence of a fellow workman (*r*).

ART. 93.—*Volunteer Servants.*

If a stranger invited by a servant to assist him in his work, or who volunteers to assist him in his work, is, while giving such assistance, injured by the negligence of another servant of the same master, the doctrine of common employment applies, and no action will lie at common law against the master.

Explanation.

The reason of this rule is obvious, for the volunteer, by aiding the servant, is simply of his own accord placing himself in the position of a servant, and that without the consent or request of the master. He has taken upon himself the risk of the common employment, and he cannot impose on the master a greater liability than that in which the master stands towards his own servants.

Thus, where the servants of a railway company were turning a truck on a turntable, and a person not in the employ of the company volunteered to assist them, and, whilst so engaged, other servants of the company negligently propelled a locomotive against, and so killed, the volunteer, it was held that the company was not liable (*s*).

Exception.

Where a person aids the servants of another, with such other's consent or acquiescence, and not as a mere volunteer,

(*r*) *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402 [C. A.].

(*s*) *Degg* v. *Midland Rail. Co.*, 1 H. & N. 773; *Potter* v. *Faulkner*, 1 B. & S. 800 [Ex. Ch.].

but for the purpose of expediting some business of his own, he is not considered to be in a position of a servant *pro tempore* (*t*). Art. 93.

SECTION II.—THE EMPLOYERS' LIABILITY ACT, 1880 (*u*).

ART. 94.—*Epitome of Act.*

(1) In the case of railway servants, labourers, husbandmen, journeymen, artificers, handicraftsmen, miners, and other persons engaged in **manual** labour and **not being domestic or menial servants,** an employer cannot set up the defence of common employment in any case where the injury complained of is due to any of the following causes, viz.:

(a) A defect in the condition of the ways, works, machinery, or plant which arose from, or had not been discovered, or remedied owing to the *negligence* of the employer, or of some person entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition.

(b) The *negligence* in the exercise of superintendence of any person in the service of the employer whose sole or principal duty is superintendence, and who is not ordinarily engaged in manual labour.

(c) The *negligence* of a person in the employment of the master to whose orders or

(*t*) *Wright* v. *London and North Western Rail. Co.*, 1 Q. B. D. 252 [C. A.].

(*u*) 43 & 44 Vict. c. 42.

Art. 94.

directions the servant at the time of the injury was bound to conform and did conform.

(d) An act or omission of any person in the service of the employer done or made **in obedience to the rules or byelaws of the employer** (not approved by a Government department), or **in obedience to particular instructions** given by any person delegated with the authority of the employer.

(e) The **negligence** of any person in the service of the employer having the charge or control of any signal-points, locomotive-engine, or train upon a railway.

(2) The injured servant, or his representatives, must give notice of his claim to the employer within six weeks of the accident, unless, in case of death, the judge thinks there was reasonable excuse for not giving it.

(3) The action must be commenced by the injured servant within six months, or by his personal representatives (if he is killed) within twelve months.

(4) The action must be brought in the County Court, but is removable, under very exceptional circumstances, to the High Court.

(5) The damages are limited to three years' average earnings.

(6) The action is an action for negligence, and any defence available at common law (except that of common employment) is good (*x*), as, for instance, contributory negligence (*y*),

(*x*) *Per* SMITH, J., in *Weblin* v. *Ballard*, 17 Q. B. D. 122, at p. 125.
(*y*) *Stuart* v. *Evans*, 31 W. R. 706.

volenti non fit injuria (*a*), or that the workman has contracted himself out of the Act (*b*). Art. 94.

Class of servants to which the Act applies.

It will be perceived that this Act applies only to a limited class of employees. Thus, a grocer's assistant is not a person engaged in manual labour within the meaning of the Act (*c*); nor is the driver of a tramcar (*d*); nor an omnibus conductor (*e*). And it only applies to accidents happening by reason of negligence of the specific kinds enumerated in the Act. It does not abolish the doctrine of common employment generally, nor on the other hand does it give an injured servant a right of action unless he can prove negligence on the part of the master or some fellow servant of the kind specified.

SECTION III.—THE WORKMEN'S COMPENSATION ACT, 1906.

The Workmen's Compensation Act, 1897, created a new kind of liability by making a master liable to pay compensation at a fixed rate to his servant if he was incapacitated by accident happening to him in the course of his employment, and to those dependent on the servant if he was killed by such accident.

The Act of 1897 was somewhat limited in its application. It was extended by the Act of 1900; and in 1906 both those Acts were repealed and the present Act was substituted for them. That Act again extended the application of the earlier Act, whilst preserving its main principles.

It must be kept in mind that *liability to pay compensation arises independently of any neglect or wrongful act* on the

(*a*) *Thomas* v. *Quartermaine*, 18 Q. B. D. 685 [C. A]. See *Yarmouth* v. *France*, *ante*, p. 189.
(*b*) *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357.
(*c*) *Bound* v. *Lawrence*, [1892] 1 Q. B. 226 [C. A.].
(*d*) *Cook* v. *North Metropolitan Tramways Co.*, 18 Q. B. D. 683.
(*e*) *Morgan* v. *London General Omnibus Co.*, 13 Q. B. D. 832 [C. A.].

part of the master or his servants. And, strictly speaking, its consideration does not belong to the law of torts at all. The liability to pay compensation is not one arising out of tort, but is an incident attached by statute to the relation of master and servant. Moreover, the amount payable is fixed by a scale, and depends not on the amount of suffering caused to the workman, or on the expenses caused by his illness, but on the difference between his wages-earning capacity before and after the accident. But the subject is so closely connected with that of the Employers' Liability Act that it is convenient here to give a slight sketch of the main principles of the Act.

ART. 95.—*Liability to Pay Compensation.*

(1) To entitle a workman to compensation he must show *either*—

(A) (i) That he has suffered personal injury by accident, and

(ii) That the "injury by accident" *arose out of his employment*, and

(iii) That the "injury by accident" *arose in the course of his employment*, and

(iv) That the injury has disabled him for at least one week from earning full wages at the work at which he was employed (*f*); *or*

(B) That by reason of his suffering from an "industrial disease," due to the nature of his employment, he has been disabled for at least one week from earning full wages at the work at which he was employed (*g*).

(*f*) Workmen's Compensation Act, 1906, s. 1.
(*g*) *Ibid.*, s. 8.

Art. 95.

(2) Where the injury by accident or industrial disease results in death the workman's dependants are entitled to compensation (*h*). "Dependants" means members of the family who were, in fact, wholly or in part dependent on his earnings (*i*).

Comment.

It must be observed that in this connection the words "*injury*" and "*accident*" are used in a popular sense.

Injury by accident.

"Injury" does not mean "injuria," *i.e.*, an actionable wrong, but physiological injury, such as a broken limb, rupture, wound, or other hurt however caused.

Accident.

"Accident" does not mean "inevitable accident." There is an "injury by accident" if a workman is hurt, whether it be by inevitable accident for which no one is to blame, or be the result of the negligence of a fellow workman, or of the employer, or of the workman who is injured.

"Accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed (*k*). And the fact that a man, by reason of his physical debility, is more likely to suffer an accident does not affect the question whether what befell him is to be regarded as an accident or not. Thus, when a workman in a very weak and emaciated condition while working in the stokehole of a ship received a heat stroke from the effect of which he died, it was held to be a death by accident (*l*). But accident does not include injury by disease alone not accompanied by any accident.

"Arising out of."

The words "arising out of" indicate the origin or cause of the accident which must be dependent on and connected with the employment, that is due to some cause or risk incidental to the employment. So where a sailor disappeared while on watch, his death was held to be due to an accident arising out of his employment (*m*). Where a

(*h*) *Ibid.*, s. 1, Sched. I.
(*i*) *Ibid.*, s. 13.
(*k*) *Per* Lord MACNAGHTEN, *Fenton* v. *Thorley*, [1903] A. C. 443.
(*l*) *Ismay, Imrie & Co.* v. *Williamson*, [1908] A. C. 437.
(*m*) *Owners of S.S. Swansea Vale* v. *Rice*, 27 T. L. R. 440.

Art. 95.

cashier, whose duty it was to take large sums of money by train to a colliery, was murdered whilst so employed, it was held that the accident arose out of his employment inasmuch as his duty exposed him to this special risk which was consequently incidental to his employment (*n*). Where a workman was injured by lightning it was held to be an accident arising out of his employment owing to the place and circumstances in which he was employed involving a greater than ordinary risk of injury by lightning (*o*). So where a teamster in the course of his employment was bitten by one of the stable cats, the accident was held to have arisen out of his employment (*p*). But where a workman was injured in the course of his employment by the tortious act of a fellow-workman **which had no relation to the employment**, the accident was held not to have arisen out of the employment (*q*).

"In the course of."

"A man may be within the course of his employment not merely while he is actually doing the work set before him, but also while he is where he would not be but for his employment, and is doing what a man so employed might do without impropriety" (*r*). So the Act applies where the accident arises on the employers' premises, but at a time when the actual employment has not commenced or after it has terminated (*s*), or during some temporary cessation of work; but does not apply when the accident occurs whilst the workman is going to, or returning from, his work.

Serious and wilful misconduct.

The fact that the accident was due to the negligence, or even to the misconduct, of the workman is no answer to his claim for compensation. If, however, the accident only results in **temporary disablement**, and was attributable to **serious and wilful misconduct**, he is not entitled to compen-

(*n*) *Nisbet* v. *Rayne and Burn*, [1910] 2 K. B. 689 [C. A.].

(*o*) *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K. B. 32 [C.A.].

(*p*) *Rowland* v. *Wright*, 24 T. L. R. 852 [C. A.].

(*q*) *Fitzgerald* v. *Clarke & Son*, [1908] 2 K. B. 796 [C. A.].

(*r*) *Per* Lord LOREBURN, L.C., *Low* or *Jackson* v. *General Steam Fishing Co.*, [1909] A. C. 523, at p. 532.

(*s*) *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K. B. 539 [C. A.].

sation (*t*). It has been held that mere disobedience to rules is not necessarily serious and wilful misconduct, even though it renders the workman liable to prosecution, and though it was such as would entitle the master to dismiss the workman without notice (*u*). Art. 95.

To whom the Act applies.

All persons who work under a contract of service or apprenticeship are "workmen" entitled to the benefit of the Act, except:

(a) persons **not engaged in manual labour** (such as clerks) **and earning more than £250** a year;
(b) persons whose **employment is casual** and are *not* employed in the employer's business, *e.g.*, a domestic charwoman not having a regular engagement;
(c) members of **the employer's family** dwelling in his house;
(d) **out-workers;**
(e) members of a **police force;**
(f) persons in the **naval or military service of the crown** (*x*).

Scale of compensation

The scale of compensation and the mode of working it out is set out in detail in Schedule I. to the Act, and has been the subject of a good many decisions. The amount to which the workman is, or, in case of death, his dependants are, entitled, depends primarily on his wages. In the case of total or partial incapacity he gets a weekly sum so long as the incapacity lasts, not exceeding half his average weekly earnings during the preceding twelve months. In the case of death his dependants get a lump sum in no case exceeding £300.

Procedure

No action lies for compensation. If the right to compensation or the amount of compensation is disputed the matter is decided in the first instance by an arbitrator, who may be, and generally is, a county court judge. From him there is an appeal direct to the Court of Appeal.

(*t*) Workmen's Compensation Act, 1906, s. 1 (2) (c).
(*u*) *Johnson* v. *Marshall, Sons & Co.*, [1906] A. C. 409.
(*x*) Workmen's Compensation Act, 1906, ss. 9, 13.

Art. 95.

Alternative remedies.

When the injury is such that there is a cause of action against the employer at common law or under the Employers' Liability Act, the workman must elect whether he will proceed for compensation or bring an action. The employer cannot be compelled to pay both damages and compensation (*y*).

(*y*) Workmen's Compensation Act, 1906, s. 1 (2).

CHAPTER X.

OF PRIVATE INJURY FROM PUBLIC NUISANCES.

Meaning of "public nuisance," and "private nuisance."

THE term "nuisance" is used to include two distinct causes of action. A **public nuisance** is an infringement of a public right and an injury to the public, for which the proper remedy is either criminal proceedings or an information by the Attorney-General on the part of the public, asking for an injunction to restrain the continuance of the public nuisance. It is only when there is some **special injury to an individual** that it is the subject of an action for damages.

A *private nuisance*, on the other hand, is some injury to the property of an individual. It is not an injury to the public.

In some cases, however, the line between public and private nuisance is rather fine. Thus, such an act as carrying on a noisy trade, or emitting foul gases, though usually only a private nuisance, may amount to a public nuisance if, by reason of the injury done to the neighbourhood, it interferes with the comfort and enjoyment of the public generally, or at least of all who come within range of it (*a*).

ART. 96.—*Description of Public Nuisances.*

(1) A public nuisance is some unlawful act, or omission to discharge some legal duty, which act or omission endangers the lives, safety, health, or comfort of the public, or by which the

(*a*) See *Soltau* v. *De Held*, 2 Sim. (N.S.) 133.

Art. 96.

public are obstructed in the exercise of some common right.

(2) No action can be brought for a public nuisance by a private person unless he has suffered some substantial particular damage beyond that suffered by the public generally.

Kinds of public nuisances.

Public nuisances consist not only of those acts or omissions which interfere with definite public rights, such as the right of the public to use a highway, but also of nuisances which endanger the health, safety, or comfort of the public generally.

So, where a sanitary authority so manage their sewers as to affect the health or comfort of the public or the inhabitants of a large district, they commit a public nuisance in respect of which the Attorney-General is the proper party to take proceeedings (*b*). As also does a person who allows rubbish or filth to be deposited on his land so as to be injurious to the inhabitants of the neighbourhood (*c*).

Nuisances to highways.

Nuisances to highways consist in any obstruction of the highway, or anything which renders the use of the highway unsafe or incommodious for the public, as physically stopping it up, or making excavations on, or immediately adjoining, it, or maintaining ruinous fences or buildings immediately adjoining it.

Examples. Excavations.

(1) Thus, where a man makes an excavation adjoining a highway, and keeps it unfenced, he commits a public nuisance and is liable for any injury occasioned to a person falling into it (*d*).

(2) So, also, traders who keep vans in a street for an unreasonable time for the purpose of loading and unloading, cause an unreasonable obstruction which may amount to a public nuisance (*e*).

(*b*) See *Att.-Gen.* v. *Luton Local Board*, 2 Jur. (N.S.) 180; *Att.-Gen.* v. *Birmingham Town Council*, 6 W. R. 811; *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560 [C. A.].

(*c*) *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560.

(*d*) *Barnes* v. *Ward*, 9 C. B. 392.

(*e*) *Att.-Gen.* v. *Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276 [C. A.].

Art. 96.

(3) To permit premises adjoining a highway to fall into a ruinous condition is a public nuisance entitling a person injured thereby to damages. Thus, where the defendant had a heavy lamp projecting over the highway, which by reason of want of repair fell on the plaintiff and injured her, it was held that the defendant was liable (*f*). Ruinous premises.

(4) So, also, a person who maintained a low spiked wall immediately adjoining a highway was held liable for injuries caused to a little girl who stumbled against the spikes whilst using the highway (*g*). And, similarly, where a boy attempted wrongfully to climb a rotten fence adjoining a highway, and the fence fell upon and injured him, he was held to be entitled to recover, because the fence was a nuisance, and he only did what might have been expected of a boy (*h*). Dangerous fences.

(5) An excavation on land not so near to a highway as to be dangerous to persons lawfully using the highway is not a nuisance, and a trespasser has no right of action if he falls into it (*i*). Excavations not adjacent to roads.

(6) A public nuisance may be authorised by statute (*k*), but the right to do what amounts to a public nuisance cannot be acquired by prescription or long user, or justified on the ground that it is in some respects a convenience to the public (*l*). So the mere fact that a nuisance to a highway has existed for a long time is no defence. In order to justify, it must be shown to have existed at the time when the highway was dedicated to the public, so that it may be inferred that the highway was dedicated subject thereto. Thus, a highway may be dedicated subject to the right to plough it up at intervals (*m*), or to hold markets or fairs on it (*n*), or to the right of an adjoining owner to maintain in Justification of nuisances.

(*f*) *Tarry* v. *Ashton*, 1 Q. B. D. 314.
(*g*) *Fenna* v. *Clare*, [1895] 1 Q. B. 199.
(*h*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320 [C. A.].
(*i*) See *Hounsell* v. *Smyth*, *ante*, p. 175.
(*k*) *R.* v. *Pease*, 4 B. & Ad. 30, *ante*, Art. 10.
(*l*) *R.* v. *Train*, 2 B. & S. 640; *R.* v. *Ward*, 4 A. & E. 384.
(*m*) *Arnold* v. *Blaker*, L. R. 6 Q. B. 433 [Ex. Ch.].
(*n*) *Elwood* v. *Bullock*, 6 Q. B. 383; *Att.-Gen.* v. *Horner*, 11 App. Cas. 66.

Art. 96. the footway a cellar flap or grating (*o*). But after the public have acquired the highway, no right to do these things can be gained except by statute.

ART. 97.—*Public Nuisance only Actionable in respect of Particular Damage.*

To enable a private person to bring an action for damages in respect of a public nuisance, he must prove either—

(a) That he has suffered some substantial damage peculiar to himself in his person or trade or calling, and different in kind from the damage suffered by the public; or

(b) That the public nuisance is also an interference with some private right or property of his.

Comment. The damage to fall within the first part of this rule must be different in kind, and not merely in degree, from that suffered by the public generally. Thus obstructing a highway is a public nuisance. A person who is merely prevented from using the highway suffers only the same damage as any other member of the public (*p*). But a person who in using the highway suffers *personal injuries* by reason of the obstruction, suffers damage peculiar to himself, and in respect thereof he has a right of action (*q*).

So, too, has a person whose business is interfered with by reason of customers being deterred from getting to his shop (*r*), or by reason of his business premises being rendered dark or less commodious (*s*).

(*o*) *Fisher* v. *Prowse*, 2 B. & S. 770; *Robbins* v. *Jones*, 15 C. B. (N.S.) 221.

(*p*) *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316.

(*q*) *Barnes* v. *Ward*, 9 C. B. 392.

(*r*) *Fitz* v. *Hobson*, 14 Ch. D. 542.

(*s*) *Benjamin* v. *Storr*, L. R. 9 C. P. 400.

Art. 97.

Again, an obstruction to a highway may also be an interference with some private right, or some property of the plaintiff, so that in that way also he suffers damage of a kind peculiar to himself. The right of access to a highway from adjoining property is a private right quite distinct from the public right of using the highway, and accordingly an obstruction which cuts off access to an highway is actionable as causing particular damage (*t*).

Abatement

Any person may abate a public nuisance by which he is obstructed in the exercise of a public right by removing the obstruction so far as is reasonably necessary to enable him to exercise the right interfered with; but he cannot do more than this. So, if there is an obstruction in a highway, a person using the highway may *only interfere with it as far as is necessary to exercise his right of passing along the highway*, and if there is room to pass by without removing the obstruction, he has no right to interfere with it (*u*), and may be liable to the owner if he damages the property by interfering with it.

ART. 98.—*Liability of Owner or Occupier for Public Nuisances.*

(1) If a person is injured by reason of a public nuisance caused by the want of repair or condition of premises adjoining a highway, the occupier is primâ facie liable and not the owner (unless he is also the occupier) (*v*). In particular the owner is *not* liable if he lets the premises to a tenant who agrees to repair them, unless (perhaps) he knows of the nuisance at the time of the letting and does nothing to remedy it (*x*).

(*t*) *Lyon* v. *Fishmongers Co.*, 1 App. Cas. 662.

(*u*) *Dimes* v. *Petley*, 15 Q. B. 276; *Davies* v. *Mann*, 10 M. & W. 546.

(*v*) *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311.

(*x*) *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658.

Art. 98.

(2) The **owner is liable** (i) if he has contracted with the tenant to repair and the nuisance is due to want of repair (*y*); (ii) if he has let the premises in a ruinous condition and the tenant has not agreed to repair (*z*).

(3) Where the premises are in the occupation of a tenant **from year to year** there is, in effect, reletting each year, and (unless the tenant has agreed to repair) the landlord is liable for damage caused by a nuisance, if since the creation of the nuisance and before the damage he might have determined the tenancy and did not, for in that case he "lets the premises in a ruinous condition" (*a*).

(4) When premises are let on a **weekly tenancy** there is not a reletting at the end of each week so as to make the landlord liable for nuisances arising since the original letting, unless he has contracted with the tenant to do repairs. For such nuisances the tenant and not the landlord is liable (*b*).

Comment.

The principle is that the occupier is primâ facie liable. An owner not in occupation is only liable if he has in some way authorised the continuance of the nuisance. He may authorise the continuance of the nuisance if, knowing of its existence, he lets the premises without repairing or requiring the tenant to repair, or if he keeps control of the premises by undertaking to repair himself.

So, too, the owner and occupier of vacant land is liable if he knows it is being so used by the public as to become a public nuisance, and does not take reasonable steps to

(*y*) *Payne* v. *Rogers*, 2 H. Bl. 350.
(*z*) *Gandy* v. *Jubber*, 5 B. & S. 78.
(*a*) *Ibid.*
(*b*) *Bowen* v. *Anderson*, [1894] 1 Q. B. 164.

prevent such a user, even though he may not himself have actively done anything to cause the nuisance (*c*). Art. 98.

But neither owner nor occupier is liable for a nuisance created by some third person without his knowledge and which he could not by reasonable care have prevented (*d*).

Illustrations.

(1) The defendant let premises to a tenant who covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, at the time of the demise, out of repair and dangerous. A passer-by, in consequence, fell into the aperture, and was injured:—*Held*, that the obligation to repair being, by the lease, cast upon the tenant, the landlord was not liable for this accident. And KEATING, J., said: "In order to render the landlord liable in a case of this sort, there must be some evidence that he authorised the continuance of this coal shoot in an insecure state; for instance, that he retained the obligation to repair the premises; that might be a circumstance to show that he authorised the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair" (*e*).

(2) A. was injured by the giving way of a grating in a public footway, which was used for a coal shoot, and for letting light into the lower part of the premises adjoining. The premises were at the time under lease to a tenant who covenanted to repair. At the time of the demise the grating was insecure, but there was no evidence that the landlady had any knowledge of its unsafe state, and the jury found she was not to blame:—*Held*, that as the premises were demised, and there was no longer any obligation on the landlord to keep them in repair, the plaintiff had no cause of action against the landlady. It was intimated that if the landlady had, at the time of the demise, known of the

(*c*) *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560 [C. A.].

(*d*) *Barker* v. *Herbert*, [1911] 2 K. B. 633.

(*e*) *Pretty* v. *Bickmore*, L. R. 8 C. P. 401, and see *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311.

Art. 98.

defect and done nothing to remedy it, she might have been liable as well as the tenant (*f*).

Liability of landlord to tenant.

(3) The above rules only apply to nuisances (*g*). They have no application as between landlord and tenant, or landlord and the guests of a tenant. Apart from contract, a lordlord is not bound to keep the demised premises in repair as regards either his tenant (*h*), or the guests of his tenant (*i*). As regards the duty of a landlord of flats to keep in repair those portions of the buildings which are not let to tenants, such as the staircases and passages, see *Miller* v. *Hancock* (*k*) and *Harygroves, Aronson & Co.* v. *Hartopp* (*l*), *supra*, p. 173.

(4) When some boys broke the railings of an area of a vacant house, so that the area was a danger to persons using the street, it was held that the owner was not liable as he did not know of the broken railing and had used reasonable care to prevent the railings becoming a nuisance. An area is not a thing a man keeps at his peril (*m*).

(*f*) *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658.
(*g*) As to private nuisances, see *post*.
(*h*) *Keates* v. *Cadogan*, 20 L. J. C. P. 76.
(*i*) *Lane* v. *Cox*, [1897] 1 Q. B. 415 [C. A.].
(*k*) [1893] 2 Q. B. 177 [C. A.].
(*l*) [1905] 1 K. B. 472.
(*m*) *Barker* v. *Herbert*, [1911] 2 K. B. 633.

CHAPTER XI.

PRIVATE NUISANCES.

SECTION I.—NUISANCE TO CORPOREAL HEREDITAMENTS.

ART. 99.—*General Liability.*

(1) A private nuisance is some unauthorised user of a man's own property causing damage to the property of another, or some unauthorised interference with the property of another, causing damage.

(2) Any private nuisance whereby sensible injury is caused to the property of another, or, whereby the ordinary physical comfort of human existence in such property is **materially** interfered with, is actionable.

(3) Liability for nuisance is independent of negligence.

(4) No use of property which would be legal if due to a proper motive, can be a nuisance merely because it is prompted by a motive which is improper or even malicious (*a*).

Comment.

The law with regard to private nuisances mainly depends upon the maxim *sic utere tuo ut alienum non lædas.* Not that that maxim can receive a literal interpretation, for a man may do many acts which may injure others (*ex. gr.*, build a house which may shut out a fine view theretofore enjoyed by a neighbour); but such acts are necessarily

(*a*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587.

Art. 99.

incidental to the ownership of property. The acts referred to in the maxim are acts which go beyond the recognised legal rights of a proprietor.

Lawful act done with malicious motive.

The owner of land containing underground water which percolates by undefined channels, and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land, so as to deprive his neighbour of it (*b*). An owner diverted underground water percolating in undefined channels, not to improve his own land, but maliciously in order to injure his neighbours by depriving them of their water supply and to compel them to buy him out. This unneighbourly conduct, however, was held to be lawful, because it was an act rightful in itself, and therefore not wrongful when done maliciously (*c*).

Illustrations. Fumes.

(1) In the leading case of *Tipping* v. *St. Helens Smelting Co.* (*d*), the fact that the fumes from the company's works killed the plaintiff's shrubs, was held sufficient to support the action; for the killing of the shrubs was an injury to the property.

Noisy and noisome trades.

(2) So, too, it was said, in *Crump* v. *Lambert* (*e*), that smoke, unaccompanied with noise or with noxious vapour, noise alone, and offensive vapours alone, although not injurious to health, may severally constitute a nuisance; and that the material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence in the plaintiff's property.

Interference with enjoyment of property.

(3) Where the alleged nuisance consists of acts which interfere with the reasonable enjoyment of property, the inconvenience must be substantial. In *Walter* v. *Selfe* (*f*), KNIGHT BRUCE, V.-C., put the question thus: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to

(*b*) *Chasemore* v. *Richards*, 7 H. L. Cas. 349.
(*c*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587.
(*d*) L. R. 1 Ch. 66.
(*e*) L. R. 3 Eq. 409.
(*f*) 4 De G. & Sm. 315, at p. 322.

elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?" Art. 99.

(4) The collection of a crowd of noisy and disorderly people outside grounds in which entertainments with music and fireworks are being given for profit, may constitute a nuisance, even though the entertainer has excluded all improper characters, and the amusements have been conducted in an orderly way (*g*). Noisy entertainments

So, too, may the collection of large and noisy crowds outside a club kept open till 3 a.m. for pugilistic encounters (*h*).

(5) So, too, the turning of the ground floor of a London house into a stable, so that the neighbours are disturbed all night by the noises of the horses, may constitute a nuisance (*i*).

(6) Other examples of nuisances to corporeal hereditaments, are, permitting buildings to become ruinous so as to fall on one's neighbour's land (*k*), overhanging eaves from which the water flows on to another's property (*l*); or overhanging trees (*m*); or pigstys creating a stench, erected near to another's house. And it would seem that noisy dogs, preventing the plaintiff's family from sleeping, are a nuisance if serious discomfort is caused (*n*). So, also, is a small-pox hospital so conducted as to spread infection to neighbouring houses (*o*). Other examples.

(*g*) *Walker* v. *Brewster*, L. R. 5 Eq. 25. See also *Inchbald* v. *Robinson, Inchbald and Barrington*, L. R. 4 Ch. 388.

(*h*) *Bellamy* v. *Wells*, 60 L. J. Ch. 156. And see also *Barber* v. *Penley*, [1893] 2 Ch. 447, and *Jenkins* v. *Jackson*, 40 Ch. D. 71.

(*i*) *Ball* v. *Ray*, L. R. 8 Ch. 467.

(*k*) *Todd* v. *Flight*, 9 C. B. (N.S.) 377.

(*l*) *Bathishill* v. *Reed*, 25 L. J. C. P. 290.

(*m*) *Lemmon* v. *Webb*, [1895] A. C. 1; *Smith* v. *Giddy*, [1904] 2 K. B. 448.

(*n*) *Street* v. *Tugwell*, Selwyn's Nisi Prius, 13th ed., 1070.

(*o*) *Metropolitan Asylums* v. *Hill*, 6 App. Cas. 193.

Art. 100.

ART. 100.—*Reasonableness of Place.*

(1) That which is primâ facie a nuisance cannot be justified by the fact that it is done in a proper and convenient place and is a reasonable use of the defendant's land (*p*).

(2) Where the acts complained of are nuisances by reason of **injury to property**, it is no defence that the locality is one devoted to trades which cause such injury (*q*).

(3) But with regard to acts which are nuisances by reason of their interfering with the **enjoyment of property**, as distinguished from those which damage the property itself, the circumstances of the locality must be taken into consideration (*r*).

Comment.

(1) The spot selected may be very convenient for the defendant, or for the public at large, but very inconvenient to a particular individual who chances to occupy the adjoining land; and proof of the benefit to the public, from the exercise of a particular trade in a particular locality, can be no ground for depriving an individual of his right to compensation, in respect of the particular injury he has sustained from it. Thus, where the defendant used his land for burning bricks and so caused substantial annoyance to his neighbour, it was held that it was no defence that it was done in a proper and convenient spot, and was a reasonable use of the land (*p*). At the same time a person is entitled to use his land or house in the ordinary way in which property of the like character is used, and an adjacent owner must put up with such noises and inconveniences as may reasonably be expected from his neighbours, such as the noise of a pianoforte, or the noise of children in their

(*p*) *Bamford* v. *Turnley*, 31 L. J. Q. B. 286 [Ex. Ch.].

(*q*) *St. Helens Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642.

(*r*) *Ibid.* and *Poisse and Alfieri, Limited* v. *Rushmer*, [1907] A. C. 121.

nursery, which are noises we must reasonably expect, and must, to a large extent, put up with (*s*). Art. 100.

(2) In *St. Helens Smelting Co.* v. *Tipping* (*t*), Lord WESTBURY said: "In matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces **material injury to the property**, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of **sensible personal discomfort.** With regard to the latter —namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town, and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground of complaint because, to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury *to property*, then unquestionably arises a very different consideration. I think that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

(*s*) See *Ball* v. *Ray*, L. R. 8 Ch. 467; *Att.-Gen.* v. *Cole*, [1901] 1 Ch. 205; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685.

(*t*) 11 H. L. Cas. 650.

Art. 100.

(3) In a recent case (*u*), WARRINGTON, J., said that for the purpose of coming to a decision whether working a noisy printing machine by night in Gough Square (a neighbourhood devoted to the printing trade) was a nuisance to a residence adjoining the square, he was to look not at the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in particular with regard to the trades usually carried on there, and the noises and disturbance existing prior to the commencement of the defendants' operations; but that if after taking these circumstances into consideration, he found a serious and not merely a slight interference with the plaintiff's comfort, he thought it his duty to interfere. And acting on this principle, he granted an injunction restraining the defendants from using their machine, although the machine was one of an improved type, quieter than those generally used, and was properly used. It was enough that in fact it created a nuisance. His decision was affirmed in the House of Lords.

ART. 101.—*Plaintiff coming to the Nuisance.*

It is no answer to an action for nuisance, that the plaintiff knew that there was a nuisance, and yet went and lived near it (*x*).

Or in the words of BYLES, J., in *Hole* v. *Barlow* (*y*): "It used to be thought that if a man knew that there was a nuisance and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That, however, is not law now." The justice of this is obvious from the consideration, that if it were otherwise, a man might be wholly prevented from building upon his land if a nuisance was set up in its

(*u*) *Rushmer* v. *Polsue and Alfieri, Limited*, 21 T. L. R. 183, affirmed in House of Lords, [1907] A. C. 121.

(*x*) *Bliss* v. *Hall*, 4 Bing. N. C. 183.

(*y*) 27 L. J. C. P. 207, at p. 208.

locality, because the nuisance might be harmless to a mere field, and therefore not actionable, and yet unendurable to the inhabitants of a dwelling-house. Art. 101.

So where a confectioner had for many years used a pestle and mortar in his kitchen in Wigmore Street, and then the plaintiff, a physician in Wimpole Street, built a consulting room in his back garden against the confectioner's kitchen, and the noise from the pestle and mortar was a nuisance to the consulting room, it was held that, although the plaintiff had come to the nuisance, he was nevertheless entitled to complain of it as a nuisance (*z*). Illustration.

ART. 102.—*Liability of Occupier and Owner for Nuisances.*

(1) The **occupier** of premises upon which a nuisance is created to adjoining property is primâ facie liable. There is no liability upon an owner as such (*a*).

(2) An owner who is not in occupation may be liable if he has originally created the nuisance and let the premises with the nuisance complained of, or, when the nuisance is due to want of repair, has permitted the premises to get out of repair, and lets them with knowledge of the want of repair, or has, as between himself and his tenant, undertaken the repairs (*b*).

(3) Where the nuisance is caused, not by the state of the premises themselves, but by their user, an owner who is not in occupation is not liable for the nuisance, although he has let

(*z*) *Sturges* v. *Bridgman*, 11 Ch. D. 852 [C. A.]; and see *Crossley & Sons, Limited* v. *Lightowler*, L. R. 2 Ch. 478.

(*a*) *Russell* v. *Shenton*, 3 Q. B. 449.

(*b*) *Rosewell* v. *Prior*, 2 Salk. 460; *Todd* v. *Flight*, 9 C. B. (N.S.) 377.

Art. 102. the premises in such a condition that they are capable of being so used as to cause a nuisance (*c*).

Comment.

(1) Generally the person who causes or authorises the nuisance is liable, so a person who creates a nuisance on his land and then lets it with the nuisance, is liable if the nuisance is continued (*d*). And the purchaser or lessee also may be liable for continuing the nuisance (*e*).

So, too, an owner of land who lets a house and undertakes, as between himself and his tenant, to repair, is liable if, by reason of his not repairing, a nuisance is caused to adjoining premises (*f*). But an owner who is not occupier is not liable unless he can be fixed with liability in one of these ways (*g*).

Nuisances caused by user of land.

(2) If a person builds a factory with a chimney on his land, and lets the land, he does not thereby authorise the user of the chimney so as to be a nuisance. It is not the existence of the chimney which is a nuisance, but its use, and for this the person who uses the chimney, not the owner of the land, is liable (*h*). So, also, if a third person against my will puts something on my land which is a nuisance to my neighbour, I am not liable, for I have not caused the nuisance (*i*).

ART. 103.—*Prescription to Commit a Nuisance.*

The right to commit a private nuisance may be acquired by grant or prescription.

NOTE.—An owner of land may by express grant give to another a right to do that which would otherwise be a

(*c*) *Rich* v. *Basterfield*, 4 C. B. 783.
(*d*) *Rosewell* v. *Prior*, 2 Salk. 460.
(*e*) *Penruddock's Case*, 5 Co. Rep. 100 b.
(*f*) *Todd* v. *Flight*, 9 C. B. (N.S.) 377.
(*g*) *Russell* v. *Shenton*, 3 Q. B. 449.
(*h*) *Rich* v. *Basterfield*, *supra*.
(*i*) *Saxby* v. *Manchester and Sheffield Rail. Co.*, L. R. 4 C. P. 198.

nuisance, *e.g.*, to discharge foul water on to his land. If a person has been actually committing a nuisance for a great many years without objection, it is reasonable to presume that he has in some way acquired a right to do so, and at common law juries were directed to **presume a lost grant** in such cases. But juries were not bound to, and in some cases refused to, presume a lost grant which they did not believe ever existed in fact (*j*). Art. 103.

The right of one owner of land to commit nuisances of this kind in respect of the land of another is a right in the nature of an easement, being not a mere personal right, but a right granted, or presumed to have been granted, by the owner of land or his predecessors in title (so as to bind all subsequent owners), to the owner of the land for whose benefit it is created for the benefit of him and all subsequent owners.

Now, by the Prescription Act, 1832, it is seldom necessary to presume a lost grant, for where an easement which might at common law be claimed by lost grant has been actually enjoyed by a person claiming it as a right without interruption for **twenty years immediately before action** brought, that is generally enough to establish the right, unless it has been enjoyed by consent or agreement (*k*). Prescription Act.

(1) Accordingly, now a person may by twenty years' user gain a right to pour foul water into another's stream (*l*). Illustrations.

(2) It must be noted that the period of twenty years only begins to run from the time when the acts complained of

(*j*) The law as it stood before the Prescription Act, "put an intolerable strain on the consciences of judges and jurymen," (*per* Lord MACNAGHTEN in *Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, at p. 236).

(*k*) 2 & 3 Will. 4, c. 71. The period is in some cases forty years, as when the land of the servient tenement (that is the land whose owner is supposed to have made the grant) has been owned by some person who could not lawfully make a grant to bind his successors in title, such as a tenant for life. If there has been forty years' enjoyment the right can only be defeated by showing that it was enjoyed under an express grant or consent in writing. No grant can now be presumed from enjoyment for a less period than twenty years.

(*l*) *Wright* v. *Williams*, 1 M. & W. 77; and see *Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A. C. 229.

Art. 103. begin to be a nuisance. So when the defendant had for more than twenty years made a noise which did not amount to an actionable nuisance to his neighbour, because the neighbour's land was not built on, he acquired no easement by so doing; and accordingly when the plaintiff built a consultation room on the land affected by the noise, and the noise then began to be a nuisance, it was held that the defendant had not acquired a right under the Prescription Act (*m*).

(3) A person can only acquire by prescription a right to do acts of the same kind and amount as he has used for the period of enjoyment. So if he has for twenty years poured a certain amount of filth of a particular kind into a stream, he can only prescribe to discharge filth of that amount and of that kind, and is not justified in pouring in any larger amount, or filth of a different kind (*n*).

ART. 104.—*Remedy of Reversioners for Nuisances.*

Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrongdoer (*o*).

Illustrations. (1) Any **permanent** obstruction of an incorporeal right, as of way, air, light, water, etc., may be an injury to the reversion (*p*).

(2) But an action will not lie for a nuisance of a mere transient and temporary character (*q*). Thus, a nuisance arising from noise or smoke will not support an action by

(*m*) *Sturges* v. *Bridgman*, 11 Ch. D. 852 [C. A.].
(*n*) *Crossley & Sons, Limited* v. *Lightowler*, L. R. 2 Ch. 478.
(*o*) *Bedingfield* v. *Onslow*, 3 Lev. 209.
(*p*) *Kidgill* v. *Moor*, 9 C. B. 364; *Metropolitan Association* v. *Petch*, 27 L. J. C. P. 330; *Greenslade* v. *Halliday*, 6 Bing. 379.
(*q*) *Baxter* v. *Taylor*, 4 B. & Ad. 72.

the reversioner (*r*). Some injury to the reversion must always be proved, for the law will not assume it (*s*). Art. 104.

ART. 105.—*Remedy by Abatement.*

(1) A person injured by a nuisance may abate it, that is remove that which causes the nuisance, provided that he commits no riot in the doing of it, nor occasions any damage beyond what the removal of the inconvenience necessarily requires (*t*).

(2) Where there are alternative ways of abating a nuisance the less mischievous must be chosen (*u*).

(3) A person cannot justify doing a wrong to an innocent third party or to the public in abating a nuisance. So it seems that entry on the lands of an innocent third party cannot be justified (*x*).

(4) In order to abate a nuisance an entry may be made on the lands on which the cause of the nuisance is, provided notice requesting removal of the nuisance be first given. But if a nuisance can be abated without committing a trespass no notice is required (*y*).

(5) An entry on another's land to prevent an apprehended nuisance cannot be justified.

Notice.

It must be observed that notice is generally necessary before entry on the lands of another—but it seems that

(*r*) *Mumford* v. *Oxford, Worcester and Wolverhampton Rail. Co.*, 25 L. J. Ex. 265 ; *Simpson* v. *Savage*, 26 L. J. C. P. 50.

(*s*) *Kidgill* v. *Moor*, 9 C. B. 364.

(*t*) Stephen's Commentaries, Bk. V., Chap. I. (15th ed., Vol. III., p. 284). It is generally very imprudent to attempt to abate a nuisance. It is far better to apply for an injunction.

(*u*) *Per* BLACKBURN, J., in *Roberts* v. *Rose*, L. R. 1 Ex. 82 [Ex. Ch.], at p. 89.

(*x*) *Ibid.*

(*y*) *Lemmon* v. *Webb*, [1895] A. C. 1.

Art. 105. notice is dispensed with in three cases, viz., (a) where the owner of the land was the original wrongdoer, by placing the nuisance there; (b) where the nuisance arises by default in performance of some duty cast on him by law; and (c) when the nuisance is immediately dangerous to life or health (*z*).

Examples. (1) Thus, if my neighbour build a wall and obstruct my ancient lights, I may after notice and request to him to remove it, enter and pull it down (*a*); but where the plaintiff had erected scaffolding in order to build, which building when erected would have been a nuisance, and the defendant entered and threw down the scaffolding, such entry was held wholly unjustifiable (*b*).

(2) Branches of trees overhanging a man's land may be cut to abate the nuisance without notice, provided this can be done without committing a trespass (*c*).

Pulling down inhabited house. (3) A commoner may abate an encroachment on his common by pulling down a house or a fence obstructing his right (*d*); so also may one whose right of way is obstructed (*e*); before pulling down a house, notice and request to remove must be given *if the house is actually inhabited* (*f*).

(*z*) See *Jones* v. *Williams*, 11 M. & W. 176.
(*a*) *R.* v. *Rosewell*, 2 Salk. 459.
(*b*) *Norris* v. *Baker*, 1 Roll. Rep. 393, fol. 15.
(*c*) *Lemmon* v. *Webb*, [1895] A. C. 1.
(*d*) *Mason* v. *Cæsar*, 2 Mod. Rep. 65.
(*e*) *Lane* v. *Capsey*, [1891] 3 Ch. 411.
(*f*) *Davies* v. *Williams*, 16 Q. B. 556; *Lane* v. *Capsey*, [1891] 3 Ch. 411.

SECTION II.—NUISANCES TO INCORPOREAL HEREDITAMENTS.

Servitudes.

A servitude is a duty or service which is owed in respect of one piece of land, either to the owner as such of another piece of land, or to some other person. Property to which such a right is attached is called the dominant tenement, that over which the right is exercised being denominated the servient tenement.

Where the right is annexed to a dominant tenement it is said to be **appurtenant** if it arises by prescription or grant, and **appendant** if it arises by manorial custom. Where it is annexed merely to a person it is said to be a **right in gross.**

Natural servitudes.

Servitudes are either natural or conventional. Natural servitudes are such as are necessary and natural adjuncts to the properties to which they are attached (such as the right of support to land in its natural state), and they apply universally throughout the kingdom. Conventional servitudes, on the other hand, are not universal, but must always arise either by custom, prescription, or express or implied grant. The right to the enjoyment of a conventional servitude is called an *easement* or a *profit à prendre in alieno solo*, according as the right is merely a right of user, or a right to enter another's land and take something from it, as game, fish, minerals, gravel, turf, or the like.

Easements and *profit à prendre.*

The easements known to our law are numerous. Mr. Gale, in his excellent treatise on Easements, gives a list of no less than twenty-five "amongst other" instances. Any unjustifiable interference with an easement or other servitude is a tort, and torts of this kind are usually classed with nuisances. As the rights interfered with are incorporeal hereditaments, they are spoken of as nuisances to incorporeal hereditaments. Torts of this kind are as various as are the kinds of easements and other servitudes, but in an elementary work such as this, it is only possible to treat of those which most often occur in practice, namely, interferences with: (1) rights of support for land, (2) rights of support for buildings, (3) rights to the free access of light and air,

(4) rights to the use of water, and (5) rights of way. And as to these, it is only proposed to deal with the nature of the rights sufficiently to enable the student to appreciate what kind of acts amount to disturbances. The law relating to the acquisition of servitudes and their incidents belongs rather to the law of property than to that of torts.

Franchises.

Another kind of incorporeal right is a franchise, and a disturbance of that right is a nuisance. Franchises include rights of ferry and market. Other rights akin to franchises are patent rights, copyrights, and rights to trade marks; the nature and acquisition of which depend largely upon the several statutes relating thereto. The right to vote for members of Parliament is also a franchise, and an action lies for preventing a person from exercising that right (*g*).

Disturbances or interferences with *profits à prendre* (such as rights of common and fisheries) and of franchises (such as ferries and markets) are torts, and are properly included among nuisances to incorporeal hereditaments. But the nature of these rights and what acts amount in law to disturbances belongs rather to the law of property than to that of torts, and cannot be conveniently discussed in an elementary work on torts.

ART. 106.—*Disturbance of Right of Support for Land without Buildings.*

(1) Every person commits a tort, who so uses his own land as to deprive his neighbour of the subjacent or adjacent support of mineral matter necessary to retain such neighbour's land in its natural and unencumbered state (*h*).

(2) A man may not pump from under his own land a bed of wet sand so as to deprive his

(*g*) *Ashby* v. *White*, 2 Lord Raym. 938; 1 Sm. L. C. 240.

(*h*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Birmingham Corporation* v. *Allen*, 6 Ch. D. 284 [C. A.].

Art. 106.

neighbour's land of support (*i*); but he may pump water from under his own land with impunity, although the result may be to deprive his neighbour's land of support (*k*).

(3) In order to maintain an action for disturbance of this right, some appreciable subsidence must be shown (*l*), or, where an injunction is claimed, some irreparable damage must be threatened (*m*).

(4) The right of support may be destroyed by covenant, grant or reservation (*n*).

Illustrations.

The right arises *ex jure naturæ*.

(1) In *Humphries* v. *Brogden* (*o*), Lord CAMPBELL said: "The right to *lateral* support from adjoining soil is not, like the support of one building from another, supposed to be gained by grant, but it is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period. *Pari ratione* where there are separate freeholds from the surface of the land and the mines belong to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings *and in its natural state*, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support is left; but if the surface subsides and is injured by the removal of these strata, although the operation may not have been conducted negligently nor contrary to the custom of the country, the

belonging

(*i*) *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch. 217 [C. A.].

(*k*) *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; but see *per* LINDLEY, M.R., in *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch., at p. 239.

(*l*) *Smith* v. *Thackerah*, L. R. 1 C. P. 564, as explained in *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301 [C. A.], at p. 313.

(*m*) *Birmingham Corporation* v. *Allen*, 6 Ch. D. 284 [C. A.].

(*n*) *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348; *Aspden* v. *Seddon*, L. R. 10 Ch. App. 394, and cases there cited.

(*o*) 12 Q. B. 739.

Art. 106. owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence.

Subterranean water.

(2) But although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there would seem to be nothing at common law to prevent him draining that soil, if for any reason it becomes necessary or convenient for him to do so. It has therefore been held that he is not liable if the result of his drainage operations is to cause a subsidence of his neighbour's land (*p*). But whatever may be true of percolating waters themselves, if a man withdraws, along with that water, quicksand or water-logged soil, and in consequence thereof his neighbour's land settles and cracks, he will be liable (*q*). And the same remark applies *a fortiori* to the withdrawal of pitch or other liquid mineral, and (it is submitted) to mineral oil (*r*).

Exception.

(3) Companies governed by the Railways Clauses Consolidation Act, 1845, do not acquire any such right to subjacent support, by purchasing the surface; and the owners of the mines may, after having given notice to the company, so as to give them the opportunity of purchasing the mines, work them with impunity in the ordinary way (*s*). But neither will an action lie against the company for any damage suffered by the mine owner, although perhaps he may demand compensation under the Act (*t*).

(*p*) *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; but see the observations on this case made by LINDLEY, M.R., and RIGBY, L.J., in *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch. 217 [C. A.], at pp. 239, 243.

(*q*) The subject was discussed in *Salt Union* v. *Brunner, Mond & Co.*, [1906] 2 K. B. 822. There the defendants were held not liable for pumping brine from under their land though the result was to remove the support of neighbouring land by dissolving the salt in the subsoil. The decision, however, turned on the special circumstances of the case, and does not support the general principle that brine may be lawfully pumped so as to remove the support of adjacent lands.

(*r*) *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch. 217; *Trinidad Asphalt Co.* v. *Ambard*, [1899] 2 Ch. 260, and [1899] A. C. 594 [P. C.].

(*s*) *Great Western Rail. Co.* v. *Bennett*, L. R. 2 H. L. 27; *Ruabon Brick Co.* v. *Great Western Rail. Co.*, [1893] 1 Ch. 427 [C. A.].

(*t*) See *Dunn* v. *Birmingham Canal Co.*, L. R. 8 Q. B. 42 [Ex. Ch.].

ART. 107.—*Disturbance of Support of Buildings.*

Art. 107.

(1) A tort is *not* committed by one who so deals with his own property, as to take away the support necessary to uphold his neighbour's *buildings*, unless a right to such support has been gained by grant, express or implied (*u*), or by twenty years' uninterrupted user, peaceable, open, and without deception (*x*).

(2) But the owner of land may maintain an action for disturbance of the natural right to support for the surface, notwithstanding buildings have been erected upon it, provided the weight of the buildings did not cause the injury (*y*).

Right not *ex jure naturæ*.

(1) Thus, in *Partridge* v. *Scott* (*z*), it was said that "rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds a house at the extremity of his land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbour's, unless he has some grant to that effect." So, again, as between adjoining houses, there is no obligation towards a neighbour, cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbour's property (*a*).

Right acquired by twenty years' user.

(2) But a grant of a right of support for buildings is gained by uninterrupted user for twenty years, if the enjoyment is peaceable and without deception or conceal-

(*u*) *Partridge* v. *Scott*, 3 M. & W. 220; *Brown* v. *Robins*, 4 H. & N. 186; *North Eastern Rail. Co.* v. *Elliott*, 29 L. J. Ch. 808.

(*x*) *Dalton* v. *Angus*, 6 App. Cas. 740.

(*y*) *Brown* v. *Robins*, 4 H. & N. 186; *Stroyan* v. *Knowles*, *Hamer* v. *Same*, 6 H. & N. 454.

(*z*) *Ubi supra.*

(*a*) *Chauntler* v. *Robinson*, 4 Ex. 163.

Art. 107. ment, and so open that it must be known that some support is being enjoyed by the plaintiff's building (b).

(3) The right of support for an ancient building by adjacent buildings may be acquired by prescription in the same way as may the right of support by adjacent lands (c).

Where natural right to support of soil is brought, the consequence thereof to a [illegible] house may be [illegible].

(4) Though no right of support for a building has been gained, yet if the act of the defendant would have caused the site of the building to subside without the building, the defendant will be liable, not merely for the damage done to the land, but also for the injury caused to the building. For he will have committed a wrongful act (viz., an act causing the subsidence of his neighbour's land), and will consequently be liable for all damages which might reasonably have been anticipated as the consequence of that act (d).

ART. 108.—*Disturbance of Right to Light and Air.*

(1) There is no right, *ex jure naturæ*, to the free passage of light to a house or building, but such a right may be acquired by (a) express or implied grant from the contiguous proprietors; (b) by reservation (express or implied) on the sale of the servient tenement; or (c) by actual enjoyment of such light for the full period of twenty years without interruption submitted to or acquiesced in for one year after the owner of the dominant tenement shall have had notice thereof, and of the person making or authorising such interruption (e).

(b) *Bedford* v. *Angus*, 6 App. Cas. 740.
(c) *Lemaître* v. *Davis*, 19 Ch. D. 281.
(d) *Stroyan* v. *Knowles*, *Hamer* v. *Sidney*, 6 H. & N. 454.
(e) 2 & 3 Will. 4, c. 71, ss. 3, 4.

Art. 108.

(2) A right to the free access of air through a particular defined channel, or through a particular aperture, may be acquired (*f*) in the same way as a right to light. But a right to the free access of air over land to land or buildings at large cannot (it seems) be acquired (*g*).

(3) Where the owner of a house has acquired a right over land to light in respect of any windows in that house, any person who builds on that land so close to those windows as to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) as to render it impossible to carry on business therein as beneficially as before, commits a tort (*h*).

Illustrations.

Implied grants of right.

(1) Implied grants of easements are generally founded on the maxim, "A man cannot derogate from his own grant." In other words, the grantor of land which is to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made (*i*).

Right gained by prescription.

(2) To gain a right by prescription under s. 3 of the Prescription Act, 1832 (*k*), there must be user without the written consent of the owner of the servient tenement, uninterrupted for twenty years, from the time when window spaces are complete and the building is roofed in (*l*). As, however, by s. 4, nothing is to be deemed an interruption unless submitted to for a year after notice, it has been held

(*f*) *Bass v. Gregory*, 25 Q. B. D. 481; *Cable* v. *Bryant*, [1908] 1 Ch. 259.

(*g*) *Webb* v. *Bird*, 13 C. B. (N.S.) 841; *Bryant* v. *Lefever*, 4 C. P. D. 172 [C. A.]; *Chastey* v. *Ackland*, [1895] 2 Ch. 389 [C. A.]; see *S. C.*, [1897] A. C. 155.

(*h*) *Colls* v. *Home and Colonial Stores, Limited*, [1904] A. C. 179.

(*i*) *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437.

(*k*) 2 & 3 Will. 4, c. 71.

(*l*) *Collis* v. *Laugher*, [1894] 3 Ch. 659.

Art. 108.

that enjoyment for nineteen years and 330 days, followed by an interruption of thirty-five days just before the action was commenced, was sufficient to establish the right (*m*). However, for the purposes of commencing an action an inchoate title of nineteen years and a fraction is not sufficient, and no injunction will be granted until the twenty years have expired (*n*).

Right to access of air.

(3) Actions to prevent, or to claim damages for, interference with ancient lights, are frequently spoken of as cases of light and air, and the right relied on, as a right to the access of "light and air." Most of the cases relate solely to the interference with the access of light, and it has been said that a right to the access of air over the general unlimited surface of the land of a neighbour cannot be acquired by mere enjoyment (*o*). Thus, in *Webb* v. *Bird* (*p*), it was held that the owner of an ancient windmill could not, under the Prescription Act, prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill. A similar decision was given in *Bryant* v. *Lefever* (*q*), where it was sought to restrain the defendant from building so as to obstruct the access of air to the plaintiff's chimneys. But there seems really to be no difference in principle between easements of light and of air, and a right to the uninterrupted passage of air through a defined aperture, such as a window used for ventilation (*r*), or a ventilating shaft (*s*), may be acquired by grant or prescription.

Degree of interference giving rise to an action.

(4) Where a right to light has been acquired by express grant, the question whether any substantial infringement of the right has taken place must depend upon the construction of the grant. But where a right has been acquired by implied grant or under the Prescription Act, the owner of

(*m*) *Flight* v. *Thomas*, 11 A. & E. 688 [Ex. Ch.].

(*n*) *Lord Battersea* v. *City of London Commissioners of Sewers*, [1896] 2 Ch. 708.

(*o*) *Per* COTTON, L.J., *Bryant* v. *Lefever*, 4 C. P. D. 172 [C. A.]. See also *Chasey* v. *Ashland*, [1896] 2 Ch. 859 [C. A.]: [1897] A. C. 135.

(*p*) 13 C. B. (N.S.) 841.

(*q*) *Supra*.

(*r*) *Cable* v. *Bryant*, [1908] 1 Ch. 259.

(*s*) *Bass* v. *Gregory*, 25 Q. B. D. 481.

Art. 108.

the right is entitled to prevent any person from building so close to the window in respect of which the light is acquired as to render the occupation of the house in which the window is situated uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) to prevent the owner from carrying on business as beneficially as before (*t*). The sole question to be determined in deciding whether a right to light has been so far infringed as to give rise to an action is whether the obstruction is so great as to amount to a nuisance (*u*). It follows, therefore, that the use of an extraordinary amount of light for twenty years will not give rise to a right to receive that amount of light always, because the question whether an obstruction of light is so great as to be a nuisance cannot be affected by any considerations of what the light has been used for (*x*). Very generally speaking an obstruction of the light which flows to a window will not be considered a nuisance if the light which remains can still flow to the window at an angle of forty-five degrees with the horizontal, especially if there is good light from other directions as well (*y*).

ART. 109.—*Disturbance of Water Rights.*

(1) Every owner of land on the banks of a natural stream has a right *ex jure naturæ* to the ordinary use of the water which flows past his land (*e.g.*, for irrigation, feeding cattle, domestic purposes, etc.). Such an owner may also make use of the water for other purposes than ordinary ones, provided that, in so doing, he does not interfere with the similar rights of other riparian owners lower down the stream (*z*).

(*t*) *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179.

(*u*) *Ibid.*, *per* Lord DAVEY, at p. 204.

(*x*) *Ambler* v. *Gordon*, [1905] 1 K. B. 417.

(*y*) *Per* Lord LINDLEY in *Colls* v. *Home and Colonial Stores*, [1904] A. C., at p. 210; and see *Kine* v. *Jolly*, [1905] 1 Ch. 480 [C. A.].

(*z*) *Miner* v. *Gilmour*, 12 Moo. P. C. C. 131; *Embrey* v. *Owen*, 6 Ex. 353.

Art. 109.

(2) An artificial watercourse may have been originally made under such circumstances, and have been so used, as to give to the owners on each side all the rights which a riparian proprietor would have had if it had been a natural stream (*a*).

(3) There is, however, no right to the continued flow of water which runs through natural underground channels, which are undefined or unknown, and can only be ascertained by excavation (*b*).

(4) No one has a right to pollute the water percolating under his own land and flowing thence by underground channels into another's land so as to poison the water which that other has a right to use (*c*).

Illustrations.

Rights of riparian owners.

(1) Every riparian owner may reasonably use the stream for drinking, watering his cattle, or turning his mill, and other purposes connected with his tenement, provided he does not thereby seriously diminish the stream (*d*). But he has no right to divert the water to a place outside his tenement, and there consume it for purposes unconnected with the tenement (*e*).

Disturbance of riparian rights.

(2) If the rights of a riparian proprietor are interfered with, as by diverting the stream or abstracting or fouling the water, he may maintain an action against the wrongdoer for violation of the right, even though he may not be able to prove that he has suffered any actual loss (*f*). So if one erects a weir which affects the flow of water to

(*a*) *Baily & Co.* v. *Clark, Son and Morland*, [1902] 1 Ch. 649 [C. A.]; *Whitmore's (Edenbridge), Limited* v. *Stanford*, [1909] 1 Ch. 427.

(*b*) *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655.

(*c*) *Ballard* v. *Tomlinson*, 29 Ch. D. 115 [C. A.].

(*d*) *Embrey* v. *Owen*, 6 Ex. 353; *White (John) & Sons* v. *White (J. and M.)*, [1906] A. C. 72.

(*e*) *McCartney* v. *Londonderry and Lough Swilly Rail. Co.*, [1904] A. C. 301.

(*f*) *Wood* v. *Waud*, 3 Ex. 748; *Embrey* v. *Owen*, 6 Ex. 353; *Crossley* v. *Lightowler*, L. R. 2 Ch. 478.

riparian owners lower down the river, an injunction will be granted (*g*). Art. 109.

(3) But where a riparian owner takes water from a river, and after using it for cooling certain apparatus returns it undiminished in quantity and unpolluted in quality, a lower riparian owner has no right of action. For his only right is to have the water abundant and undefiled, and that right is not infringed (*h*).

Abstracting underground water.

(4) The owner of land containing underground water, which percolates by undefined channels, or by defined but unascertained channels, and flows to the land of a neighbour, has the right to divert or appropriate the water within his own land so as to deprive his neighbour of it (*i*). The same rule applies to common surface water rising out of springy or boggy ground and flowing in no defined channel (*k*).

Fouling underground water.

(5) But although there can be no *property* in water running through underground undefined channels, yet no one is entitled to pollute water flowing beneath another's land. Thus, in *Ballard* v. *Tomlinson* (*l*), where neighbours each possessed a well, and one of them turned sewage into his well, in consequence whereof the well of the other became polluted, it was held by the Court of Appeal that an action lay; for there is a considerable difference between intercepting water in which no property exists, on the one hand, and sending a new, foreign and deleterious substance on to another's property, on the other. The one merely deprives a man of something in which he has no property, the other causes an active nuisance.

(*g*) *Belfast Ropeworks* v. *Boyd*, 21 L. R. Ir. 560 [C. A.].

(*h*) *Kensit* v. *Great Eastern Rail. Co.*, 27 Ch. D. 122 [C. A.]. In that case the water was abstracted by a non-riparian owner under a license from a riparian owner. The license however, could not confer any right, as a riparian owner clearly cannot confer on others such rights as he has as riparian owner. But, as the action failed against the non-riparian owner, *a fortiori* it would against a riparian owner taking away water and returning it undiminished and unpolluted.

(*i*) *Chasemore* v. *Richards*, 7 H. L. Cas. 749; *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655; *Bradford Corporation* v. *Pickles*, [1895] A. C. 587, see *ante*, p. 226.

(*k*) *Rawstron* v. *Taylor*, 11 Ex. 369.

(*l*) 29 Ch. D. 115.

Art. 109. Rights in derogation of those of the other riparian proprietors may be gained by grant or prescription (*m*).

Exception. Prescriptive rights.

ART. 110.—*Disturbance of Private Rights of Way.*

(1) A right of way over the land of another can only arise by grant, express or implied, or by prescription.

(2) A person commits a tort who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily, or by otherwise preventing its free user.

Right restricted by the terms of the grant or the extent of the user.

We are here dealing with private rights of way, as distinguished from public rights of way. A public way or highway is a right enjoyed by the public to pass over land. A private right of way is a right one person may enjoy by grant or prescription to pass over another's land, or which an owner of land may have by grant or prescription for himself, his tenants and servants to pass over the lands of another.

There may also by custom be a way which can only be lawfully used by the inhabitants of a parish for going to and from the parish church (*n*).

Obstruction of rights of way.

(2) It does not require a permanent obstruction to give rise to a right of action. Thus padlocking a gate (*o*), or permitting carts or wagons to remain stationary on the road in the course of loading and unloading, in such a way as to obstruct the passage over the road, will give rise to an action (*p*).

(*m*) See *Mason* v. *Hill*, 3 B. & Ad. 304; *Carlyon* v. *Lovering*, 1 H. & N. 784.

(*n*) See *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344.

(*o*) *Kidgill* v. *Moor*, 9 C. B. 364.

(*p*) *Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650.

CHAPTER XII.

TRESPASS TO THE PERSON.

Introductory.

In the case of most of the torts which we have hitherto considered, there was a wrongful act distinct from the damage to the plaintiff, and which would, if it had not been followed by damage, have given no right of action. But in the case of trespass to the person, and of trespass to land and goods, the wrongful act and the damage resulting from it are practically indivisible. These are what are spoken of in many text books as *injuriæ*. They require no proof of damage resulting from the wrongful act. The mere fact that a private right has been infringed **without lawful excuse**, constitutes of itself both wrongful act and damage, and gives the party affronted a right of action, even although his actual surroundings may have been improved rather than depreciated.

Trespass consists in (a) infringements of the right of safety and freedom of the person (trespass to the person); (b) infringements of rights of real property (trespass to land); and (c) infringements of rights to goods (trespass to goods).

Art. 111.—*General Liability for Trespass to the Person.*

(1) Trespass to the person may be by assault, battery, or false imprisonment.

(2) Any person who commits a trespass to the person whether by assault, battery, or im-

Art. 111. prisonment without lawful justification commits a tort.

Ancient classification.

The older writers speak of six kinds of trespasses to the person: threats, assault, battery, wounding, mayhem (or maiming) and false imprisonment. But at the present time it is sufficient to distinguish the three groups above mentioned.

Onus of proof.

Primâ facie every hostile interference with the person or liberty of another is wrongful without proof of damage; but as we shall see, acts which are primâ facie trespasses may often be justified. The burden of proof of justification always lies on the defendant. The plaintiff need only prove that without his consent the defendant committed an act which would primâ facie amount to a trespass to the person, and it is for defendant to justify if he can.

ART. 112.—*Definition of Assault.*

An assault is an attempt or offer to do harm to the person of another, which might have succeeded if persevered in, or would have succeeded but for some accident.

Attempt.

(1) Thus, if one make an attempt, and have at the time of making such attempt a present primâ facie ability to do harm to the person of another, although no harm be actually done, it is nevertheless an assault. For example, menacing with a stick a person within reach thereof, although no blow be struck (*a*); or striking at a person who wards off the blow with his umbrella or walking-stick, would constitute assaults.

Threat.

(2) But a mere verbal threat is no assault; nor is a threat consisting not of words but gestures, **unless there be a present ability to carry it out.** This was illustrated by

(*a*) *Read* v. *Coker*, 13 C.B. 850.

POLLOCK, C.B., in *Cobbett* v. *Grey* (*b*). "If," said the learned judge, "you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault (*c*), 'I will commit an assault,' I think that is not an assault." Art. 112.

(3) To constitute an assault there must be an *attempt*. Therefore, if a man says that he would hit another were it not for something which withholds him, that is no assault, as there is no apparent attempt (*d*).

(4) For the same reason, shaking a stick in sport at another is not actionable (*e*).

ART. 113.—*Definition of Battery.*

(1) Battery consists in touching another's person hostilely or against his will, however slightly (*f*).

(2) If the violence be so severe as to wound, and *a fortiori* if the hurt amount to a mayhem (that is, a deprivation of a member serviceable for defence in fight), the damages will be greater than those awarded for a mere battery; but otherwise the same rules of law apply to these injuries as to ordinary batteries.

Illustrations

(1) This touching may be occasioned by a missile or any instrument set in motion by the defendant, as by throwing water over the plaintiff (*g*), or spitting in his face, or causing another to be medically examined against his or

(*b*) 4 Exch. 729, at p. 744.
(*c*) *Query*—Battery.
(*d*) *Tuberville* v. *Savage*, 1 Mod. Rep. 3.
(*e*) *Christopherson* v. *Blare*, 11 Q. B. 473, at p. 477.
(*f*) *Rawlings* v. *Till*, 3 M. & W. 28.
(*g*) *Pursell* v. *Horn*, 8 A. & E. 602.

Art. 113.

her will (*h*). In accordance with the rule, a battery must be involuntary: therefore a beating voluntarily suffered is not actionable: for *volenti non fit injuria* (*i*).

Friendly touching.

(2) Merely touching a person in a friendly way in order to engage his attention, is no battery (*k*).

Pure accident.

(3) An entirely unintentional touching, which is the result of pure accident, does not amount to trespass. Where one of a shooting party fired at a pheasant and a shot from his gun glanced off a tree and accidentally wounded the plaintiff, a carrier, it was held that there was no trespass (*l*). But whenever an injury to the person is the result of an act of direct force, it amounts to trespass to the person if it is wrongful, either as being **wilful** or as being **the result of negligence** (*m*).

Accident in course of doing unlawful act.

(4) But a touch unintentional and without negligence is an assault if it be done **in the course of doing an unlawful act** (*n*). Thus, where a tramway company was authorised by statute to run a steam tramcar on a public road, the statute must be taken to impose on the company a duty to see that the cars and tramway, and all necessary apparatus, are kept in proper condition for this purpose. If they fail to do so, and the tramway be in an improper condition, then, in running their cars on that tramway, they are doing **that which they are not authorised to do by their Act.** They are only authorised to be on the highway at all by their Act; and as regards the public, they can only justify using the tramway if they are doing what the Act allows them to do. If, therefore (apart from any question of negligence), a car runs on the defective tramway, and injures a passer-by, the company will be liable; for it is a direct injury to the person done in the course of doing an unlawful act, and without justification or excuse (*o*).

(*h*) *Latter* v. *Braddell and Sutcliffe*, 29 W. R. 239.
(*i*) *Christopherson* v. *Bare*, 11 Q. B. 473.
(*k*) *Coward* v. *Baddeley*, 28 L. J. Ex. 260.
(*l*) *Stanley* v. *Powell*, [1891] 1 Q. B. 86.
(*m*) *Per* BRAMWELL, B., in *Holmes* v. *Mather*, L. R. 10 Ex. 261.
(*n*) *Sadler* v. *South Staffordshire and Birmingham District Steam Tramways Co.*, 23 Q. B. D. 17 [C. A.].
(*o*) *Ibid.*

ART. 114.—*Definition of False Imprisonment.* Art. 114.

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification (*p*). The restraint may be either physical or by a mere show of authority.

Moral restraint.

Imprisonment does not necessarily imply incarceration, but any restraint by force or show of authority. For instance, where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him, that constitutes an imprisonment (*q*). So, too, it is imprisonment if one is restrained in his own house from leaving a room and going upstairs (*r*). But some total restraint there *must* be, for a partial restraint of locomotion in a particular direction (as by preventing the plaintiff from exercising his right of way over a bridge) is no imprisonment; for no restraint is thereby put upon his liberty (*s*).

Actual restraint for however short a time constitutes imprisonment—as when a prisoner who has been acquitted was taken down to the cells and detained for a few minutes whilst questions were put to him by the warders (*t*).

False imprisonment and malicious prosecution.

It is sometimes difficult to distinguish false imprisonment from malicious prosecution. If a person is charged with an offence, and is imprisoned in consequence, an action may lie for false imprisonment or malicious prosecution, or both. The distinction, however, is important. It is discussed hereafter. See Art. 118.

Habeas corpus.

In addition to the remedy by action, the law affords a peculiar and unique summary relief to a person wrongfully imprisoned, viz., the writ of *habeas corpus ad subjiciendum.*

(*p*) *Bird* v. *Jones*, 7 Q. B. 742.
(*q*) *Warner* v. *Riddiford*, 4 C. B. (N.S.) 180.
(*r*) *Grainger* v. *Hill*, 4 Bing. N. C. 212; see *Harvey* v. *Mayne*, 6 Ir. C. L. R. 417.
(*s*) *Bird* v. *Jones*, *supra.*
(*t*) *Mee* v. *Cruikshank*, 86 L. T. 708.

Art. 114. *Habeas corpus.*

This writ may be obtained by motion made to any superior court, or to any judge when those courts are not sitting, by any of his Majesty's subjects. The party moving must show probable cause that the person whose release he desires is wrongfully detained. If the court or judge thinks that there is reasonable ground for suspecting illegality, the writ is ordered to issue, commanding the detainer to produce the party detained in court on a specified day, when the question is summarily determined. If the detainer can justify the detention, the prisoner is remitted to his custody. If not, he is discharged, and may then have his remedy by action (*u*).

ART. 115.—*Justification of Trespass to the Person.*

A trespass to the person, whether amounting to assault, battery, or false imprisonment, may be justified by the defendant as being authorised by the exercise of a right at common law or by statute, and if the defendant prove the facts alleged in justification, the plaintiff must fail.

Justification.

Trespass to the person may be justified as being (a) in defence of property or person (*x*); (b) as being in the exercise of parental or other special authority (*y*); (c) as being an arrest or imprisonment made by judicial authority (*z*); (d) as being an arrest on suspicion of felony or misdemeanor, or for preservation of the peace (*a*).

But in every case the force used must not exceed that which is reasonably required in the circumstances, and any excess of violence amounts to a trespass.

(*u*) See 31 Car. 2, c. 2, and 56 Geo. 3, c. 100.
(*x*) See Art. 116.
(*y*) See Art. 117.
(*z*) See Art. 118.
(*a*) See Arts. 119—123.

ART. 116.—*Self-defence as Justification of Assault and Battery.*

Art. 116.

Assault and battery is justified if made in self-defence or in defence of real or personal property, provided the force used does not exceed that which is reasonably required in the circumstances.

Any violence in excess of what is reasonably necessary is a trespass.

Self-defence

(1) A battery is justifiable if committed in self-defence. Such a plea is called a plea of "son assault demesne." But, to support it, the battery so justified must have been committed in actual defence, and not afterwards and in mere retaliation (*b*). Neither does every common battery excuse a mayhem. As, if "A. strike B., B. cannot justify drawing his sword, and cutting off A.'s hand," unless there was a dangerous scuffle, and the mayhem was inflicted in self-preservation (*c*).

Defence of property.

(2) A battery committed in defence of real or personal property is justifiable. Thus, if one forcibly enters my house, I may forcibly eject him; but if he enters quietly, **I must first request him to leave**. If after that he still refuses, I may use sufficient force to remove him, in resisting which he will be guilty of an assault (*d*).

(3) Lord E. was steward of Doncaster Races. With his sanction, tickets for the grand stand were issued at one guinea each, entitling the holder to come into the stand and the enclosure. The plaintiff, having bought a ticket, came into the enclosure. The defendant, by order of Lord E., asked him to leave, and when he refused, after a reasonable time had elapsed, put him out, using no unnecessary violence, but not returning the guinea:—*Held*, that the defendant was justified, as he was acting by order of Lord

(*b*) *Cockroft* v. *Smith*, 11 Mod. Rep. 43.
(*c*) *Cook* v. *Beal*, Ld. Raym. 177.
(*d*) *Wheeler* v. *Whiting*, 9 C. & P. 262.

Art. 116. E. in removing the plaintiff from Lord E.'s enclosure. The ticket was a revocable licence, and as soon as it was revoked, the plaintiff was a trespasser (*e*).

Imprisonment not justified.

(4) It should be added that an owner of property is *not* justified in forcibly detaining another to compel restitution of his property (*f*).

ART. 117.—*Justification by Parental or Other Authority.*

Assault and imprisonment may be justified as being done in the lawful exercise of parental or other authority.

Parental and other authority.

(1) A father may moderately chastise his son, and this authority he may delegate to a schoolmaster. Schoolmasters are justified in moderately chastising and in putting restraint on the liberty of their pupils; and this authority extends to chastisement for offences committed whilst going to and returning from school (*h*). But for any excess of punishment an action for assault or false imprisonment lies. So, too, a master may chastise his apprentice (*i*).

Marital authority.

(2) It was formerly thought that a husband had the right of chastising and imprisoning his wife—but this can no longer be regarded as the law (*k*).

Naval and military officers.

(3) Officers in the army and navy, and officers of territorials have statutory authority by which they may justify assaults and imprisonment of the men under them as being authorised punishments for military or naval offences (*l*).

(*e*) *Wood* v. *Leadbitter*, 13 M. & W. 838.
(*f*) *Harvey* v. *Mayne*, 6 I. R. C. L. 471.
(*h*) *Cleary* v. *Booth*, [1893] 1 Q. B. 465.
(*i*) *Penn* v. *Ward*, 2 C. M. & R. 338.
(*k*) *R.* v. *Jackson*, [1891] 1 Q. B. 671 [C. A.].
(*l*) See *Marks* v. *Frogley*, [1898] 1 Q. B. 888 [C. A.].

ART. 118.—*Justification by Judicial Authority.* Art. 118.

When a person is arrested or imprisoned by judicial authority no action for trespass to the person lies against the judge who gives the authority, or against persons executing his orders, or against the person who set the law in motion.

Distinction between false imprisonment and malicious prosecution.

This general proposition must be read with the qualifications and explanation given in Arts. 8 and 9, where we have discussed the consequences of irregularities and want of jurisdiction. Assuming the judgment, sentence, or order to be regular, and the imprisonment or arrest to be authorised by it, the protection is absolute, and no action for assault or false imprisonment will lie against the judge, or against the persons who carry out the order, or against the person who procured the order from the judge.

(1) So if I lay an information before a justice, upon which he issues his warrant for the arrest of the alleged offender, it is his arrest and not mine. Though I may be liable in an action for malicious prosecution I cannot be liable in an action for false imprisonment.

(2) But if, without the interposition of any judicial authority, I request a constable to arrest a person, I make him my agent for that purpose, and, if the arrest is not justifiable on some ground, I am liable as if I had myself arrested him. Accordingly it is important to distinguish clearly cases where the arrest is judicial from those where it is not. The distinction is thus laid down by WILLES, J. (*m*):

Rule laid down by WILLES, J.

"The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment

(*m*) *Austin* v. *Dowling*, L. R. 5 C. P. 534, at p. 540.

Art. 118. because he does not set a ministerial officer in motion but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer."

(3) False imprisonment only lies where the defendant has **taken on himself the responsibility of directing the imprisonment.** When a person merely gives information to a police officer, and he arrests on his own initiative, the person giving the information is not guilty of a trespass (*n*), though, of course, the police officer may be.

So, too, signing a charge sheet is not in itself evidence of anything supporting an action for false imprisonment against the person who signs (*n*). Though, when accompanied by other circumstances (as in *Austin* v. *Dowling* (*o*)), it may show that the person who signs authorises the imprisonment.

ART. 119.—*Power of Magistrates to Arrest or order Arrest.*

If a felony, or breach of the peace, be committed **in view of a justice**, he may personally arrest the offender or command a bystander to do so, such command being a good warrant. But if he be not present, he must issue his written warrant to apprehend the offender (*p*).

Warrant for arrest.

Except in the case mentioned in this Article a magistrate can only justify an arrest made by his order if he has issued a written warrant for arresting the person arrested. A

(*n*) *Grinham* v. *Willey*, 4 H. & N. 496.
(*o*) L. R. 5 C. P. 534.
(*p*) 2 Hale P. C. 86.

warrant is an authority to the person to whom it is directed (usually a constable) to arrest the person named therein. It is issued by a justice of the peace upon information given to him that the person to be arrested is suspected of having committed an offence. The magistrate in issuing a warrant acts judicially, and, at common law the warrant was an absolute justification for any arrest made by a constable within the terms of the warrant, provided the magistrate had jurisdiction (*r*). But there are some cases in which an arrest may lawfully be made without warrant; these are dealt with in the following Articles. Art. 119.

ART. 120.—*Power of Constables and Others to Arrest in Obedience to Warrant.*

No action lies against a constable, or any person acting by his order and in his aid, for anything done in obedience to any warrant issued by any justice of the peace notwithstanding any defect of jurisdiction of such justice (*s*).

NOTE.—At common law an action lay against a constable if he arrested a person upon a warrant issued by a justice who had no jurisdiction to issue it (see *ante*, Art. 9) but constables and those assisting them are protected by this enactment, whether the justice of the peace has jurisdiction to issue the warrant, or not.

The statute does not, however, afford any protection to a constable who does something not authorised by the warrant, as, *e.g.*, if he arrests the wrong person.

(*r*) See *ante*, Art. 9.
(*s*) 24 Geo. 2, c 44, s. 6.

Art. 121. ART. 121.—*Arrest for Felony without Warrant.*

(1) **Any person** may arrest another without a warrant **if a felony has in fact been committed,** and he has reasonable grounds for suspecting that the person arrested has committed the felony.

(2) **A constable** may arrest any person without a warrant **if he has reasonable grounds** for thinking that a felony has been committed, and that it has been committed by the person arrested.

Felons.

A treason or felony having *been actually committed*, a private person may arrest one *reasonably*, although erroneously, suspected by him; but the suspicion must not be mere surmise (*t*).

In an action for false imprisonment, where the defendant, in order to justify himself, must prove that a felony was in fact committed, and where it appears that if it were committed it could only have been committed by the plaintiff, the fact that the latter has been tried for the alleged felony and acquitted, does not estop the defendant from giving evidence that he did really commit it. For the verdict in the criminal trial was *res inter alios acta*, and is not binding on the defendant in a distinct proceeding (*u*).

Cases of suspected felony.

As we have seen, a private person can only arrest a suspected felon in cases where a felony has actually been committed by **some one**; and if it should turn out that no such felony was ever committed, he will be liable, however reasonable his suspicions may have been. It would, however, be obviously absurd to require a constable to satisfy himself at his peril that a felony had been in fact committed before acting; and consequently the law provides that a

(*t*) *Beckwith* v. *Philby*, 6 B. & C. 635.
(*u*) *Cahill* v. *Fitzgibbon*, 16 L. R. Ir. 371.

constable may make an arrest merely upon reasonable suspicion that a felony has been committed, and that the party arrested was the doer; and even though it should turn out eventually that no felony has been committed, he will not be liable (*v*). The suspicion, however, must be a reasonable one, or the constable will be liable. Art. 121.

The constable was formerly an officer appointed for a constablewick or other district, who had at common law certain powers within that district. Police constables are now appointed for counties and boroughs under various statutes, and the constables so appointed have throughout the counties or boroughs for which they are appointed, the powers which at common law a constable had within his constablewick, together with other statutory powers (*x*). Constables.

(1) Thus, a person told the defendant, a constable, that a year previously he had had his harness stolen, and that he now saw it on the plaintiff's horse, and thereupon the defendant went up to the plaintiff and asked him where he got his harness from, and the plaintiff making answer that he had bought it from a person unknown to him, the constable took him into custody, although he had known him to be a respectable householder for twenty years. It was held that the constable had no reasonable cause for suspecting the plaintiff, and was consequently liable for the false imprisonment (*y*). But, on the other hand, where a constable knows that a warrant is out against a man, that is sufficient ground for his reasonably suspecting that a felony has been committed (*z*). Illustrations.

(2) But where one man falsely charges another with having committed a felony, and a constable, at and by his direction, takes the other into custody, the party making the charge, and not the constable, is liable (*a*). "It would be most mischievous," Lord MANSFIELD remarks, "that

(*v*) *Marsh* v. *Loader*, 14 C. B. (N.S.) 535; *Griffin* v. *Coleman*, 28 L. J. Ex. 134.

(*x*) See the Police Acts, especially s. 8 of the County Police Act, 1839, and the Municipal Corporations Act, 1882, s. 191.

(*y*) *Hogg* v. *Ward*, 27 L. J. Ex. 443.

(*z*) *Creagh* v. *Gamble*, 24 L. R. Ir. 458.

(*a*) *Davis* v. *Russell*, 5 Bing. 354.

Art. 121. the officer should be bound first to try, and at his peril exercise his judgment as to the truth of the charge. He that makes the charge alone is answerable" (*b*).

ART. 122.—*Power of Arrest for Preservation of the Peace.*

For the sake of preserving the peace, any person who sees it broken may without a warrant arrest him whom he sees breaking it at the moment of the affray or immediately after, so long as there is a reasonable prospect of a renewal of the affray (*c*).

The right of arrest stated in this Article is only to prevent disturbances of the peace. It seems that all persons taking part in the affray may be arrested—provided there is a prospect of the affray being renewed—and may be detained till the heat is over, and may then be delivered to a constable to be taken before a magistrate. Thus, when the plaintiff entered the defendant's shop and exchanged blows with a shopman, the defendant was justified in arresting him and handing him over to the constable, on the ground that though the affray had not been actually committed in his presence, yet the plaintiff persisted in remaining on the premises in such circumstances as made it seem probable that he would renew the disturbance unless he was taken into custody (*c*). In such circumstances it seems that a constable is justified in taking the disturber upon the information of one who has seen the affray (even though he was not himself present) if there is a prospect of its being renewed (*c*). There is some authority for saying that a constable may arrest imme-

(*b*) *Griffin* v. *Coleman*, 4 H. & N. 265.
(*c*) *Timothy* v. *Simpson*, 1 Cr. M. & R. 757.

diately after an affray even though there is no prospect of the affray being renewed; but the proposition is open to doubt (*d*). Art. 122.

ART. 123.—*Arrest for Misdemeanor.*

No person has at common law power to arrest another for a misdemeanor without a warrant; but by various statutes powers of arrest for misdemeanor are given to constables and others to arrest without a warrant.

The following list is not complete, but it contains some examples of statutory powers of arrest for misdemeanor:

(1) Any person may arrest and take before a justice one *found committing* an indictable offence between 9 p.m. and 6 a.m. (*e*). Night offenders.

(2) The owner of property or his servant, or a constable, may arrest and take before a magistrate anyone *found committing* malicious injury to such property (*f*). Malicious injurers.

(3) Any person may arrest and take before a magistrate one *found committing* an act of vagrancy (*g*). Vagrants.

N.B.—Such acts are soliciting alms by exposure of wounds, indecent exposure, false pretences, fortune-telling, betting, gaming in the public streets, and many other acts, for which I must refer to the fourth section of the Act.

(4) A constable or churchwarden may apprehend, and take before a magistrate, any person disturbing divine service (*h*). Brawlers.

(*d*) See the cases discussed in Clerk and Lindsell on Torts, 2nd ed., p. 666.
(*e*) 14 & 15 Vict. c. 19, s. 11.
(*f*) 14 & 15 Vict. c. 19, s. 11; 24 & 25 Vict. c. 97, s. 61.
(*g*) 5 Geo. 4, c. 83.
(*h*) 23 & 24 Vict. c. 32, s. 3.

Art. 123.

Other Acts.

(5) Many Acts of Parliament give powers of arrest of persons committing offences and refusing to give their names and addresses when requested. See, for instance, the Railways Clauses Consolidation Act, 1845, s. 154, and the Motor Car Act, 1903.

ART. 124.—*Institution of Criminal Proceedings endangers Right of Action for Assault.*

Where any person unlawfully assaults or beats another, two justices of the peace, upon complaint of the party aggrieved, may hear and determine such offence, and if they deem the offence not to be proved, or find it to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the complaint, they must forthwith make out a certificate stating the fact of such dismissal, and deliver the same to the party charged.

If any person shall have **obtained a certificate of dismissal,** or **having been convicted shall have suffered the punishment inflicted,** he shall be released from all further or other proceedings, civil or criminal, for the same cause (*i*).

Comment.

(1) A certificate can only be granted by magistrates where there has been a hearing upon the merits. Where the prosecutor, having obtained a summons, did not attend to give evidence and the magistrates dismissed the summons, the magistrates had no jurisdiction to give a certificate of dismissal (*k*). The fact that the accused has been ordered by the magistrates to enter into recognizances to keep the peace and to pay the recognizance fee, will not constitute a bar to an action (*l*).

(*i*) 24 & 25 Vict. c. 100, ss. 42—45.
(*k*) *Reed* v. *Nutt*, 24 Q. B. D. 669.
(*l*) *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553.

Art. 124.

(2) The granting a certificate by magistrates where the complaint is dismissed, is not merely discretionary. Magistrates are bound, on proper application, to give the certificate mentioned in the section (*m*); and, if they refuse to do so, may be compelled by *mandamus* (*n*).

(3) The words "from all further or other proceedings civil or criminal, for the same cause," include all proceedings against the defendant arising out of the same assault, whether taken by the prosecutor or by any other person (*o*) consequentially aggrieved thereby (*p*).

ART. 125.—*Amount of Damages.*

In assessing the damages for an assault, or battery, or false imprisonment, the time when, and the place in which, the trespass took place should be taken into consideration.

Thus, an assault committed in a public place calls for much higher damages than one committed where there are few to witness it. "It is a greater insult," remarks BATHURST, J., in *Tullidge* v. *Wade* (*q*), "to be beaten upon the Royal Exchange than in a private room."

(*m*) *Hancock* v. *Somes*, 28 L. J. M. C. 196.
(*n*) *Costar* v. *Hetherington*, 28 L. J. M. C. 198.
(*o*) *E.g.*, the complainant's husband.
(*p*) *Masper* v. *Brown*, 1 C. P. D. 97.
(*q*) 3 Wils. 18, at p. 19.

CHAPTER XIII.

OF TRESPASS TO LAND AND DISPOSSESSION.

SECTION I.—OF TRESPASS *QUARE CLAUSUM FREGIT.*

ART. 126.—*Definition.*

Trespass *quare clausum fregit* is a trespass committed in respect of another man's land, by entry on the same without lawful authority. It constitutes a tort without proof of actual damage.

Illustrations.

(1) Thus, driving nails into another's wall, or placing objects against it, are trespasses (*a*); or fox hunting across land against the will of the owner (*b*).

Trespass of cattle.

(2) So, it is generally a trespass to allow one's cattle to stray on to another's land. Thus, where the plaintiff's mare was injured by the defendant's horse biting and kicking her through the fence separating plaintiff's and defendant's land, it was held that this was a trespass for which the defendant was liable apart from any question of negligence (*c*).

Exceeding authority.

(3) Where one has authority to use another's land for a particular purpose, any user going beyond the authorised purpose is a trespass.

(4) So, where a public highway runs across the lands of a landowner, the soil of which is vested in the owner, a

(*a*) *Lawrence* v. *Obee*, 1 Stark. 22; *Gregory* v. *Piper*, 9 B. & C. 591.
(*b*) *Paul* v. *Summerhayes*, 4 Q. B. D. 9.
(*c*) *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10.

Art. 126. member of the public who uses the road not merely in exercise of his right of way, but in order to interrupt the landowner's sport, is guilty of trespass. For he is using the site of the road for a purpose not covered by his limited right of user (*e*); for the public only have a right to use a highway for passing and repassing and not for loitering or depasturing cattle (*f*), or for watching the training of horses on the adjoining lands (*g*).

Exceptions. In the following cases a person has lawful authority to enter upon another's land:

Retaking goods. (1) If one takes and places on his own land another's goods, the latter may enter and retake them (*h*).

Cattle. (2) If cattle escape on to another's land through the non-repair of a hedge which that other is bound to repair, the owner of the cattle may enter and drive them out (*i*).

Distraining for rent. (3) So a landlord may enter his tenant's house to distrain for rent, or a sheriff to do execution; but they may not break open the outer door of a house (*j*).

Reversioner inspecting premises. (4) A reversioner of lands may enter in order to see that no waste is being committed (*k*).

Grantee of easement. (5) And the grantee of an easement may enter upon the servient tenement in order to do necessary repairs (*l*).

Public rights. (6) Land may be entered under the authority of a statute (*m*); or in exercise of a public right, as of a highway; or the right to enter an inn, provided there is accommodation (*n*).

(*e*) *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142 [C. A.].
(*f*) *Dovaston* v. *Payne*, 2 H. Bl. 527; and 2 Sm. L. C. 160.
(*g*) *Hickman* v. *Maisey*, [1900] 1 Q. B. 752 [C. A.].
(*h*) *Patrick* v. *Colerick*, 3 M. & W. 483.
(*i*) See *Faldo* v. *Ridge*, Yelv. 74.
(*j*) *Semayne's Case*, 5 Co. Rep. 91 c; 1 Sm. L. C. 104.
(*k*) *Six Carpenters' Case*, 1 Sm. L. C. 132; 8 Co. Rep. 146 a.
(*l*) *Pomfret* v. *Rycroft*, 1 Saund. 321.
(*m*) *Beaver* v. *Manchester Corporation*, 26 L. J. Q. B. 311.
(*n*) *Six Carpenters' Case*, *supra*; and see *R.* v. *Ivens*, 7 C. & P. 213.

(7) Lastly, land may be entered on the ground that it is the defendant's, and that he has a right to immediate possession (*o*). A person in *wrongful* possession cannot treat the rightful owner as a trespasser (*p*). This latter, known as the plea of *liberum tenementum*, is generally pleaded in order to try the title to lands. Art. 126. *Liberum tenementum.*

ART. 127.—*Trespassers* ab initio.

(1) Whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority by doing that which he has no right to do, then, although the entry was lawful, he will be considered as a trespasser *ab initio*.

(2) But where authority is not given by the law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*.

(3) The abuse necessary to render a person a trespasser *ab initio* must be a misfeasance and not a mere nonfeasance (*q*).

Thus, six carpenters entered an inn and were served with wine, for which they paid. Being afterwards at their request supplied with more wine, they refused to pay for it, and upon this it was sought to render them trespassers *ab initio*, but without success; for although they had authority by law to enter (it being a public inn), yet the mere non-payment, being a nonfeasance and not a misfeasance, was not sufficient to render them trespassers (*q*). Illustration.

At common law this doctrine made a landlord a trespasser *ab initio* when he distrained for rent justly due, and he, or

(*o*) See *Ryan* v. *Clark*, 14 Q. B. 65.
(*p*) *Taunton* v. *Costar*, 7 Term Rep. 431.
(*q*) *Six Carpenters' Case*, 1 Sm. L. C. 132 ; 8 Co. Rep. 146 a.

Art. 127. his bailiff, was guilty of any irregularity. This, however, was very hard on landlords, and by the Distress for Rent Act, 1737 (*r*), an irregularity in such circumstances does not make the distrainer a trespasser *ab initio*, and the tenant can only recover for the special damage sustained by the irregularity.

ART. 128. — *Possession necessary to enable the Plaintiff to maintain an Action of Trespass.*

(1) In order to maintain an action of trespass, the plaintiff must be in the possession of the land; for it is an injury to possession rather than to title. A mere *interesse termini* is not sufficient (*s*).

(2) The actual possession of land suffices to maintain an action of trespass against any person **wrongfully** entering upon it; and if two persons are in possession of land, each asserting his right to it, then the person who has the title to it is to be considered in actual possession, and the other person is a mere trespasser (*t*).

(3) Where a person is in possession of land, the onus lies upon the primâ facie trespasser to show that he is entitled to enter (*u*).

Illustrations. Possession necessary.

(1) Thus a person entitled to the possession of lands or houses cannot bring an action of trespass against a trespasser until he is in actual possession of them (*x*). But when he has once entered and taken possession, he may maintain trespass against a person who was wrongfully

(*r*) 11 Geo. 2, c. 19, ss. 19, 20, and see the Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 8, which gives the same relief in case of any irregularity in a distress for poor rates.

(*s*) *Wallis* v. *Hands*, [1893] 2 Ch. 75.

(*t*) *Jones* v. *Chapman*, 2 Ex. 803, at p. 821.

(*u*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

(*x*) *Ryan* v. *Clark*, 14 Q. B. 65.

in possession at the time of his entry and continued so afterwards (*y*). Art. 128.

(2) A person who is not in actual possession at the time of the trespass may maintain trespass, if at the time of the trespass he was entitled to immediate possession, and at the time of action brought he has actual possession. His possession is then said to relate back in law to the time when the title arose, and he is considered as in possession from that time for the purposes of his action (*z*). Possession by relation.

(3) Where one parts with the right to the surface of land, retaining only the mines, he cannot maintain an action for trespass to the surface, because he is not in possession of it (*a*); but he may for a trespass to the subsoil, as by digging holes, etc. (*b*). So the owner of the surface cannot maintain trespass for a subterranean encroachment on the minerals (*c*), unless the surface is disturbed thereby. Surface and subsoil in different owners.

(4) When one dedicates a highway to the public, or grants any other easement on land, possession of the soil is not thereby parted with, but only a right of way or other privilege given (*d*). An action for trespasses committed upon it, as, for instance, by throwing stones on to it, or erecting a bridge over it, may therefore be maintained by the owner of the soil (*e*). Highways, etc.

(*y*) *Butcher* v. *Butcher*, 7 B. & C. 399, at p. 402.

(*z*) *Anderson* v. *Radcliffe*, El. Bl. & El. 806; *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493 [C. A.].

(*a*) *Cox* v. *Mouseley*, 5 C. B. 533, at p. 546.

(*b*) *Cox* v. *Glue*, 17 L. J. C. P. 162.

(*c*) *Keyse* v. *Powell*, 22 L. J. Q. B. 305.

(*d*) *Goodtitle* v. *Alker*, 1 Burr. 133; *Northampton Corporation* v. *Ward*, 1 Wils. 114.

(*e*) *Every* v. *Smith*, 26 L. J. Ex. 344; and see Art. 126, Illustration 4, *supra*.

Art. 129.

ART. 129.—*Trespasses by Joint Owners.*

Joint tenants, or tenants in common, can only sue one another in trespass for acts done by one inconsistent with the rights of the other (*f*).

Ordinary joint holders.

(1) Among such acts may be mentioned the destruction of buildings (*g*), carrying off of soil (*h*), and expelling the plaintiff from his occupation (*i*).

Co-owners of mines.

(2) But a tenant in common of a coal mine may get the coal, or license another to get it, not appropriating to himself more than his share of the proceeds; for a coal mine is useless unless worked (*k*).

Party-walls.

(3) There is also one other important case of trespass between joint owners, viz., that arising out of a party-wall. If one owner of the wall excludes the other owner entirely from his occupation of it (as, for instance, by destroying it, or building upon it), he thereby commits a trespass; but if he pulls it down for the purpose of rebuilding it, he does not (*l*).

ART. 130.—*Limitation.*

All actions for trespass to land must be commenced within six years next after the cause of action arose (*m*); but when a trespass is continuing, there is a new cause of action constantly arising, and the plaintiff may bring successive actions until the trespass ceases (*n*).

(*f*) See *Jacobs* v. *Seward*, L. R. 5 H. L. 464.
(*g*) *Cresswell* v. *Hedges*, 31 L. J. Ex. 497.
(*h*) *Wilkinson* v. *Haygarth*, 12 Q. B. 837.
(*i*) *Murray* v. *Hall*, 7 C. B. 441.
(*k*) *Job* v. *Potton*, L. R. 20 Eq. 84.
(*l*) *Stedman* v. *Smith*, 26 L. J. Q. B. 314; *Cubitt* v. *Porter*, 8 B. & C. 257.
(*m*) Limitations Act, 1623 (21 Jac. 1, c. 16), s. 3.
(*n*) *Bowyer* v. *Cook*, 4 C. B. 236.

ART. 131.—*Remedies other than by Action.*

Art. 131.

(1) One who is in possession of land may forcibly turn out another who wrongfully enters, using no more force than is reasonably necessary.

(2) When animals or other chattels are wrongfully upon land the person in possession may distrain them *damage feasant.*

Comment.

Distress damage feasant.

As to forcibly ejecting a trespasser, see *ante*, Art. 116. In the case of animals or other chattels found trespassing, the law gives the person in possession of the land the right to seize and detain them in order to compel the owner to make reasonable compensation for the damage done (*o*). There is no power of sale; and the power of detention is only in respect of the actual damage done by the offending animal, either to the land itself or to other animals on the land (such as damage caused by one horse kicking another) (*p*). This remedy is not, however, available where animals are being actually tended; in such case the person injured must bring his action. A somewhat analogous remedy is allowed in the case of animals *feræ naturæ* reared by a particular person. In such cases the law, not recognising any property in them, does not make their owner liable for their trespasses, but any person injured may shoot or capture them while trespassing. Thus, at common law, I may kill pigeons coming upon my land, but I cannot sue the breeder of them (*q*).

(*o*) See *Green* v. *Duckett*, 11 Q. B. D. 275.

(*p*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

(*q*) *Hannam* v. *Mockett*, 2 B. & C. 934, *per* BAYLEY, J. But the killing may amount to a criminal offence by the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 23.

Art. 132.

SECTION II.—OF DISPOSSESSION.

ART. 132.—*Definition.*

Dispossession or ouster consists of wrongfully withholding the possession of land from the rightful owner.

Specific remedy.

Before the Judicature Act, 1873, the remedy for this wrong was by an action of ejectment, and since that statute it is by an action for the recovery of land wherein the plaintiff claims possession of the land.

A successful plaintiff gets a judgment for possession and *mesne profits*, *i.e.*, damages for the profits of the land which the plaintiff has lost whilst the defendant was wrongfully in possession, and for any damage done to the land by him whilst he was in possession.

ART. 133.—*Onus of Proof of Title.*

The law presumes possession to be rightful, and therefore the claimant must recover on the strength of his own title, and not on the weakness of the defendant's (*r*).

Possession primâ facie evidence of title.

(1) Thus, mere possession is primâ facie evidence of title until the claimant makes out a better one (*s*).

Title of successful claimant need not be indefeasible.

(2) But where the plaintiff makes out a better title than the defendant, he may recover the lands, although such title may not be indefeasible. Thus, where one inclosed waste land, and died without having had twenty years' possession, the heir of his devisee was held entitled to recover it against a person who had entered upon it without any title (*t*).

(*r*) *Martin* v. *Strachan*, 5 Term Rep. 107.
(*s*) *Doe* d. *Smith* v. *Webber*, 1 A. & E. 119.
(*t*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

Art. 133.

Jus tertii.

(3) Conversely, a man in possession who may not have an indefeasible title as against a third party, may yet have a better title than the actual claimant, and therefore he may set up the right of a third person to the lands, in order to disprove that of the claimant (*y*). But the claimant cannot do the same, for possession is, in general, a good title against all but the true owner (*x*).

Exceptions.

Landlord and tenant.

(4) Where the relation of landlord and tenant exists between the plaintiff and defendant, the landlord need not prove his title, but only the expiration of the tenancy; for a tenant cannot in general dispute his landlord's title (*y*), unless a defect in the title appears on the lease itself (*z*). But nevertheless he may show that his landlord's title has *expired*, by assignment, surrender, or otherwise (*a*). The principle does not extend to the title of the party through whom the defendant claims prior to the demise or conveyance to him. Thus, where the plaintiff claims under a grant from A. in 1818, and the defendant under a grant from A. in 1824, the latter may show that A. had no legal estate to grant in 1818 (*b*).

Servants and licensees.

(5) The same principle is applicable to a licensee or servant, who is estopped from disputing the title of the person who licensed him (*c*).

(*u*) *Doe* d. *Carter* v. *Barnard*, 13 Q. B. 945.

(*x*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Richards* v. *Jenkins*, 17 Q. B. D. 544.

(*y*) *Delaney* v. *Fox*, 26 L. J. C. P. 248.

(*z*) *Saunders* v. *Merryweather*, 35 L. J. Ex. 115; *Doe* d. *Knight* v. *Smythe*, 4 M. & S. 347.

(*a*) *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065; *Walton* v. *Waterhouse*, 1 Wms. Saund. 420.

(*b*) *Doe* d. *Oliver* v. *Powell*, 1 A. & E. 531.

(*c*) *Doe* d. *Johnson* v. *Baytup*, 3 A. & E. 188; *Turner* v. *Doe* d. *Bennett*, 9 M. & W. 643 [Ex. Ch.].

Art. 134.

ART. 134.—*Limitation.*

No person can bring an action for the recovery of land or rent but within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims (*d*).

Exceptions Disability.

(1) Where claimants are under disability, by reason of infancy, coverture, or unsound mind, they must bring their action within six years after such disability has ceased: provided that no action shall be brought after thirty years from the accrual of the right (*e*).

Acknowledgment of title

(2) When any person in possession of lands or rents gives to the person, or the agent of the person entitled to such lands or rents, an acknowledgment in writing and signed, of the latter's title, then the right of such last-mentioned person accrues at, and not before, the date at which such acknowledgment was made, and the statute begins to run as from that date (*f*).

Ecclesiastical corporations.

(3) The period in the case of ecclesiastical and eleemosynary corporations is sixty years (*g*).

ART. 135.—*Commencement of Period of Limitation.*

The right to maintain ejectment accrues, (a) in the case of an estate in possession, at the time of dispossession or discontinuance of possession of the profits or rent of lands, or of the

(*d*) 37 & 38 Vict. c. 57, s. 1, replacing 3 & 4 Will. 4, c. 27, s. 2; *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297. The owner of the legal estate must, however, be a party to the action (*Allen* v. *Woods*, 68 L. T. 143 [C. A.]).

(*e*) 37 & 38 Vict. c. 57, ss. 3—5, replacing 3 & 4 Will. 4, c. 27, ss. 16, 17.

(*f*) *Ley* v. *Peter*, 27 L. J. Ex. 239.

(*g*) 3 & 4 Will. 4, c. 27, s. 29.

death of the last rightful owner (*h*); and, (b) in respect of an estate in reversion or remainder or other future estate or interest, at the determination of the particular estate. But a reversioner or remainderman must bring his action within twelve years from the time when the owner of the particular estate was dispossessed, or within six years from the time when he himself becomes entitled to the possession, whichever of these periods may be the longer (*i*). Art. 135.

Discontinuance.

(1) Discontinuance does not mean mere abandonment, but rather an abandonment by one followed by actual possession by another (*k*). Therefore, in the case of mines, where they do not belong to the surface owner, the period cannot commence to run until someone actually works them; and even then it only commences to run *quâ* the vein actually worked (*l*).

Continual assertion of claim.

(2) No defendant is deemed to have been in possession of land merely from the fact of having entered upon it; and, on the other hand, a continual assertion of claim preserves no right of action (*m*). Therefore, a man must actually bring his action within the time limited; for mere assertion of his title will not preserve his right of action after adverse possession for the statutory period. As to what acts constitute dispossession, see *Littledale* v. *Liverpool College* (*n*).

(*h*) 3 & 4 Will. 4, c. 27, s. 3.

(*i*) 37 & 38 Vict. c. 57, s. 2.

(*k*) See *Smith* v. *Lloyd*, 23 L. J. Ex. 194; *Cannon* v. *Rimington*, 12 C. B. 1.

(*l*) See *Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186, 187; *Ashton* v. *Stock*, 6 Ch. D. 726.

(*m*) 3 & 4 Will. 4, c. 27, ss. 10, 11.

(*n*) [1900] 1 Ch. 19 [C. A.].

CHAPTER XIV.

TRESPASS TO GOODS, DETENTION AND CONVERSION OF GOODS.

ART. 136.—*Definitions.*

There are three specific torts in respect of the possession of goods:

(i) *Trespass*, which consists in wrongfully taking goods out of the plaintiff's possession, or forcibly interfering with them whilst they are in his possession;

(ii) *Detention of goods or detinue*, which consists in wrongfully detaining from the plaintiff goods to the immediate possession of which he is entitled;

(iii) *Conversion*, which consists in the defendant's wrongfully converting to his own use goods to the possession of which the plaintiff is entitled, by taking them away, detaining them, destroying them, delivering them to a third person, or otherwise depriving the plaintiff of them.

NOTE.—The ancient causes of action for torts to goods were trespass and detinue. The action of "trover and conversion" was invented later, and was founded on the fiction that the defendant had found the plaintiff's goods and converted them to his own use.

The broad distinction between trespass on the one hand and conversion and detinue on the other hand, is that trespass

Art. 136.

is the only cause of action where the goods interfered with remain in the possession of the plaintiff; whereas an action for conversion or detention lies when the plaintiff is wrongfully deprived of the possession of his goods by the defendant.

Trespass.

Trespass may be the result of an intentional conscious act of taking or touching goods, or may be the result of mere negligence. So where A. drives his carriage so negligently that it collides with B.'s carriage, this is a trespass (*a*), just as, if he collides with B.'s person, it would be trespass to the person. But it seems that there must be either intention or negligence, and a merely accidental touching does not constitute trespass (*b*).

The principal distinction between detention and conversion is in the remedy sought.

Detinue for return of goods.

When the defendant has got possession of the plaintiff's goods (whether wrongfully in the first instance, or by keeping them wrongfully after having lawfully obtained possession) the plaintiff can sue either for wrongful detention or for conversion, but generally an **action for detention** is brought where the defendant is at the time of action brought in wrongful possession of **specific goods**, such as a horse or a picture, which the plaintiff wishes to have returned to him.

Conversion for damages.

Conversion is the appropriate remedy where the plaintiff seeks merely **to recover as damages** the value of goods of which the defendant has deprived him. Thus, it is the proper remedy where the defendant no longer has possession of the goods, or where they cannot be identified, such as so many bushels of corn, or so much coal.

Actions for conversion or detention of goods are often brought to try title to goods, and, if the plaintiff proves his title, it is no defence that the defendant thought he himself had a good title. Thus, a person who buys A.'s goods from B. (thinking they are B.'s), and then, quite innocently, sells them to C., is guilty of a conversion, as also is C. if he refuses to give them up, or consumes them.

(*a*) *Lotan* v. *Cross*, 2 Camp. 464. (*b*) See *ante*, Art. 3.

A trespass may be justified as being done in self defence or in exercise of a right, or in other ways illustrated by the examples below. Art. 136. Justification.

(1) If one draws wine out of a cask and fills up the deficiency with water, he converts the whole cask. He converts the wine he draws out by taking it, and the remainder by turning it into something different, and so destroying it (*c*). Illustrations.

(2) So, again, if a sheriff sells more goods than are reasonably sufficient to satisfy a writ of *fieri facias*, he will be liable for a conversion of those in excess (*d*). Excessive execution.

(3) Beating the plaintiff's dogs is a trespass (*e*). Injuring animals.

(4) The innocence of the trespasser's intentions is immaterial. Thus, where the sister-in-law of A., immediately after his death, removed some of his jewellery from a drawer in the room in which he had died to a cupboard in another room, in order to insure its safety, and the jewellery was subsequently stolen, it was held that the sister-in-law had been guilty of a trespass, and that it was no defence that she had removed the goods bonâ fide for their preservation, and she was consequently held liable for nominal damages. It was suggested, however, that if the removal was in fact reasonably necessary for their preservation and was carried out in a reasonable manner, that might have been a good defence (*f*). But, on the other hand, the finder of a lost chattel does not commit a tort by merely warehousing or otherwise safeguarding it for a reasonable time until the true owner be discovered, so long as he is not unnecessarily officious (*g*). Intention immaterial.

(5) Again, where the owner of household furniture assigned it by bill of sale to the plaintiff, and subsequently employed the defendants (who were auctioneers) to sell it for her by auction, and they sold *and delivered possession*

(*c*) *Richardson* v. *Atkinson*, 1 Stra. 576.
(*d*) *Aldred* v. *Constable*, 6 Q. B. 370, at p. 381.
(*e*) *Dand* v. *Sexton*, 3 Term Rep. 37.
(*f*) *Kirk* v. *Gregory*, 1 Ex. D. 55.
(*g*) See *per* BLACKBURN, J., in *Hollins* v. *Fowler*, L. R. 7 H. L. 757, at p. 766.

Art. 136.

to the purchaser from them, they were held liable, although they knew nothing of the bill of sale (*h*). It is important, however, to note that the tort there was the *delivery* of the furniture to the purchaser, and not the mere selling of it (*i*).

Conversion by innocent purchaser.

(6) So the purchaser of a chattel takes it, as a general rule, subject to what may turn out to be defects in the title (*j*). Thus, in the leading case of *Hollins* v. *Fowler* (*k*), it was laid down that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

(7) Where, however, the true owner has parted with a chattel to A. upon an actual contract, though there may be circumstances which enable that owner to set the contract aside for fraud, yet a bonâ fide purchaser from A. will obtain an indefeasible title (*l*).

Sale in market overt.

(8) To this rule, however, there is an exception, that a sale of goods in market overt gives a good title to the purchaser, although the seller has no title. So a purchaser in market overt cannot be sued in an action for conversion if he parts with the goods or refuses to give them up on demand. But this rule only protects the purchaser, and the seller in open market is guilty of conversion by selling and delivering goods to which he has no title (*m*). The sale must be an open sale in a lawfully constituted market, and made according to the usages of the market. By special custom all shops in the city of London are market overt

(*h*) *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495.

(*i*) See *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; and *per* BRETT, J., in *Fowler* v. *Hollins*, L. R. 7 Q. B. 616 [Ex. Ch.], at p. 627.

(*j*) Sale of Goods Act, 1893, s. 21, unless it be a negotiable security (as to which see *Gorgier, Mills & Co.* v. *East and West India Dock Co.*, 7 App. Cas. 801, and Sale of Goods Act, 1893, s. 25 (2)); or unless he buy it in market overt (Sale of Goods Act, 1893, s. 22), and not even then if it was stolen and the thief had been prosecuted to conviction (*ibid.*, s. 24).

(*k*) L. R. 7 H. L. 757.

(*l*) Sale of Goods Act, 1893, s. 23.

(*m*) *Peer* v. *Humphrey*, 2 A. & E. 495; *Gaisley* v. *Ledwidge*, 14 L. R. Ir. 31 [C. A.].

between sunrise and sunset for the sale of goods of the kind which by the trade of the owner are there put for sale by him. But the sale must be *by* the shopkeeper not *to* him, and it must take place in the open part of the shop, not in a room at the back (*n*). Art. 136.

Revesting on prosecution of thief.

Of this common law exception there is, however, a modification by statute, first enacted by 21 Hen. 8, c. 11, and now contained in s. 24 of the Sale of Goods Act, 1893, viz., that where goods are *stolen* and the thief is prosecuted to conviction, the property revests in the original owner, notwithstanding a sale in market overt. But note that until the conviction of the thief the property is in the person who has acquired it by sale in market overt, and no act of his before the conviction of the thief is a conversion. So, where the plaintiff's sheep were stolen and sold in open market to the defendant, and the defendant then resold and delivered them to another, and subsequently the thief was prosecuted and convicted, though the property then revested in the plaintiff, he had no remedy against the defendant. For when the defendant sold the sheep they were his, not having then revested in the plaintiff (*o*).

Justification.

(9) It is a good justification that the trespass was the result of the plaintiff's own negligent or wrongful act. Thus, if he place his horse and cart so as to obstruct my right of way, I may remove it, and use, if necessary, force for that purpose (*p*).

Self-defence or defence of property.

(10) A trespass committed in self-defence, or defence of property, is justifiable. Thus, a dog chasing sheep or deer in a park, or rabbits in a warren, may be shot by the owner of the property in order to save them, but not otherwise (*q*). But a man cannot justify shooting a dog, on the ground that it was chasing animals *ferœ naturæ* (*r*), unless it was chasing game in a preserve, in which case it seems that it may be shot in order to preserve the game, but not after the

(*n*) *Hargreave* v. *Spink*, [1892] 1 Q. B. 25.
(*o*) *Horwood* v. *Smith*, 2 Term Rep. 750.
(*p*) *Slater* v. *Swann*, 2 Stra. 872.
(*q*) *Wells* v. *Head*, 4 C. & P. 568.
(*r*) *Vere* v. *Lord Cawdor*, 11 East, 568.

Art. 136.

game are out of danger (*s*). So, too, though I may use reasonable force to remove trespassing animals from my land, I am liable in trespass if I use an unreasonable amount of force, as, for instance, by chasing trespassing sheep with a mastiff dog (*t*).

In exercise of right.

(11) A trespass committed in exercise of a man's own rights is justifiable. Thus, seizing goods of another, under a lawful distress for rent or damage feasant, is lawful.

Legal authority.

(12) Due process of law is a good justification, as, for example, an execution under a writ of *fieri facias* (*u*).

ART. 137.—*Possession necessary to maintain an Action for Trespass.*

(1) To maintain an action for *trespass* to goods, the plaintiff must at the time of the trespass have been in possession of the goods.

(2) Any possession however temporary is sufficient against a wrongdoer.

(3) Although he cannot maintain an action for trespass, the person entitled to the reversion of goods may maintain an action for any permanent injury done to them (*x*).

Possession.

To enable him to bring an action for trespass, the plaintiff need not have actual physical possession; it is enough if the goods are in the physical possession of a servant or other person who holds them for him. This kind of possession is sometimes called "**constructive possession.**" So, too, where goods are in a warehouse or in a ship, and the

(*s*) *Read* v. *Edwards*, 34 L. J. C. P. 31.

(*t*) *King* v. *Rose*, 1 Freem. 347.

(*u*) See *ante*, Art. 9.

(*x*) *Tancred* v. *Allgood*, 28 L. J. Ex. 362; *Lancashire Wagon Co.* v. *Fitzhugh*, 6 H. & N. 502; *Mears* v. *London and South Western Rail. Co.*, 11 C. B. (N.S.) 850.

Art. 137.

owner has the documents of title by means of which he can get actual possession, he may be said to have constructive possession. Another kind of possession is "**possession by relation.**" An administrator or executor has possession by relation from the moment of the death of the intestate or testator, for his title relates back to the death. And this possession by relation is enough to support an action against a wrongdoer, although at the time of the wrongful act the administrator or executor had neither title nor actual possession, nor the right to immediate possession (*y*).

Illustrations.

(1) A master of a ship, as bailee of the cargo, has actual possession, and can sue for trespass (*z*), as also can a person who has possession of another's cattle under a contract of agistment (*a*).

(2) Upon the same principle it has been held that the Postmaster-General, as bailee in possession of letters delivered to him for carriage, can recover their value in an action for negligence against a wrongdoer, even though he would not himself be liable to the owners for their loss (*b*).

(3) An owner of a chattel who has gratuitously lent it to another may maintain trespass, as it is considered to be in his possession, although the borrower has the physical possession. A loan does not, in contemplation of law, take the possession out of the owner (*c*).

(*y*) *Tharpe* v. *Stallwood*, 5 Man. & Gr. 760; and see *Kirk* v. *Gregory*, 1 Ex. D. 55.

(*z*) *Moore* v. *Robinson*, 2 B. & Ad. 817.

(*a*) *Rooth* v. *Wilson*, 1 B. & A. 59.

(*b*) *The Winkfield*, [1902] P. 42 [C. A.].

(*c*) *Lotan* v. *Cross*, 2 Camp. 464.

Art. 138.

ART. 138.—*Trespassers* ab initio.

If one, taking a chattel by authority given him by law, abuses his authority, he renders himself a trespasser *ab initio* (*d*).

Thus, where the defendant took a horse as an astray, as he was authorised by law to do, and then worked the horse (which he had no authority to do), he became a trespasser *ab initio*. But the rule only applies where the original authority is given by law—not where it is given by the parties—and the abuse must be misfeasance, not mere nonfeasance (*e*).

ART. 139.—*Conversion and Detention.*

(1) To maintain an action for wrongful detention the plaintiff must, as against the defendant, be entitled to immediate possession at the time of action brought.

(2) To maintain an action for conversion the plaintiff must, as against the defendant, have been entitled to immediate possession at the time of the conversion.

(3) The judgment in an action for wrongful detention is for the return of the goods and damages for their detention.

(4) The judgment in an action for conversion is for damages. The measure of damages is the value of the goods at the time of the conversion.

Comment.

The plaintiff need only show that he is entitled as against the defendant. He need not show a good title to the goods

(*d*) *Oxley* v. *Watts*, 1 Term Rep. 12.
(*e*) *Ibid.*

as against every one: and as possession is always a good title against a wrongdoer, it is sufficient if the plaintiff shows that he had possession and the defendant has taken them out of his possession. Art. 139.

Judgment.

In an action for wrongful detention the plaintiff gets judgment for the return of the specific goods detained or (if the plaintiff prefers) their value, and the court may order that execution shall ensue for the return of the property itself; accordingly, in this form of action, the goods must be specific ascertained goods. The plaintiff may also have damages for the detention of the goods.

In an action for conversion the judgment is for damages only, and if the defendant **satisfies the judgment**, he thereby pays for the goods, and they thereupon vest in him as if he had bought them (*f*).

Proo of conversion or detention.

A conversion or detention is commonly proved by *demand and refusal*. If the defendant has the plaintiff's goods in his possession, this is not necessarily in itself a conversion or wrongful detention. If, however, he treats them as his own, as by delivering them to a third person or consuming them, he thereby converts them to his own use. Where there is nothing else in the nature of a conversion, the plaintiff should demand their return, and if the defendant refuses to return them, his refusal is evidence of a conversion. It is also evidence of wrongful detention, and the plaintiff may then bring his action and will succeed, unless the defendant can justify his refusal to return the goods on demand (*g*).

Illustrations.

Possession of bailee.

(1) If a hirer or carrier of my goods wrongfully delivers them to a third person, the bailment is thereby determined, and the immediate right of possession at once revests in me, so that I can sue in conversion either the bailee or the person to whom he has delivered them (*h*).

(*f*) *Cooper* v. *Shepherd*, 3 C. B. 266. But judgment without satisfaction does not change the property in the goods (*Brinsmead* v. *Harrison*, L. R. 6 C. P. 584).

(*g*) See *Miller* v. *Dell*, [1891] 1 Q. B. 468 [C. A.].

(*h*) *Cooper* v. *Willomatt*, 1 C. B. 672; *Wyld* v. *Pickford*, 8 M. & W. 443.

Art. 139.

Pledge.

(2) But where goods are pledged, no action for conversion or detention will lie against the pledgee for selling them or repledging them until tender of the debt has been made and refused (*i*).

Sale of property under lien.

(3) And so, when, by a sale of goods, the property in them has passed to the purchaser, subject to a mere lien for the price, the vendor will be liable for conversion if he resells and delivers them to another. But in such a case the plaintiff will only be entitled to recover the value of the goods, less the sum for which the defendant had a lien upon them (*k*).

Possession of trustee.

(4) A trustee, having the legal property, may sue in respect of goods, although the actual possession may be in his *cestui que* trust, for he has in law the right to immediate possession (*l*).

Possession of a mere finder.

(5) In the leading case of *Armory* v. *Delamirie* (*m*), it was held that the finder of a jewel could maintain an action against a jeweller to whom he had shown it, with the intention of selling it, and who had refused to return it to him; for his possession gave him a good title against all the world except the true owner. In short, a defendant cannot set up a *jus tertii* against a person in actual possession.

(6) But the finder of lost goods has no title against any one who can show a better title. So, where a workman found a ring embedded in mud on land which was in the possession of the plaintiffs, it was held that, as finder, he acquired no title against them. The plaintiffs being in possession of the land, were in possession of the ring also. Consequently, the finder was liable to them in an action for detention when he refused to give it up to them (*n*).

(7) A bailee of goods may maintain trespass or conversion against a wrongdoer, by virtue of his having the actual

(*i*) *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. 299 [Ex. Ch.].

(*k*) *Page* v. *Cowasjee Eduljee*, L. R. 1 P. C. 127; *Martindale* v. *Smith*, 1 Q. B. 389.

(*l*) *Barker* v. *Furlong*, [1891] 2 Ch. 172.

(*m*) 1 Sm. L. C.

(*n*) *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44.

possession. So also may the bailor as he is in possession by the bailee. Thus, when an article is lent the borrower or the lender may bring an action against a wrongdoer (*o*). So also may the owner of goods let on hire (*p*), and the pledgee of goods pawned (*q*). The bailee, if he succeeds in an action of conversion, recovers the full value of the goods as damages, and must account to the bailor (*r*). Art. 139.

ART. 140.—*Waiver of Tort.*

When a conversion consists of a wrongful sale of goods, the owner of them may elect to waive the tort, and sue the defendant for the price which he obtained for them, as money received by the defendant for the use of the plaintiff (*s*). But, by waiving the tort, the plaintiff estops himself from recovering any damages for it (*t*).

Once having elected to treat the transaction as a sale, as by receiving or suing for part of the purchase-money, the plaintiff cannot afterwards sue in tort. If an action for money had and received is brought, that is a conclusive election to waive the tort; and so the bringing of an action of conversion or trespass is a conclusive election not to waive the tort. These are conclusions of law (*u*). In other cases it is a question of fact whether or not there has been an election; and if the facts show an intention to retain the remedy in tort against one tort-feasor, a settlement with another one will not affect that right, although the plaintiff

(*o*) *Nicolls* v. *Bastard*, 2 C. M. & R. 659; *Burton* v. *Hughes*, 2 Bing. 173.

(*p*) *Cooper* v. *Willomatt*, 1 C. B. 672.

(*q*) *Swire* v. *Leach*, 18 C. B. (N.S.) 479.

(*r*) See *The Winkfield*, [1902] P. 42 [C. A.], where the principles and cases are fully discussed.

(*s*) *Lamine* v. *Dorrell*, 2 Ld. Raym. 1216; *Oughton* v. *Seppings*, 1 B. & Ad. 241; *Notley* v. *Buck*, 8 B. & C. 160.

(*t*) *Brewer* v. *Sparrow*, 7 B. & C. 310.

(*u*) *Smith* v. *Baker*, L. R. 8 C. P. 350.

Art. 140. may have sued alternately both in tort and for money had and received, and although he may have got an interim injunction restraining any dealings with the money (*x*).

ART. 141.—*Trespass and Conversion by Joint Owners.*

A joint owner can only maintain trespass or conversion against his co-owner, when the latter has done some act inconsistent with the joint ownership of the plaintiff (*y*).

(1) Thus, a complete destruction of the goods would be sufficient to sustain an action, for the plaintiff's interest must necessarily be injured thereby (*z*).

(2) But a mere sale of them by one joint owner would not, in general, be a conversion, for he could only sell his share in them. But if he sold them in market overt, so as to vest the whole property in the purchaser, it would be a conversion (*a*).

ART. 142.—*Remedy by Recaption.*

When anyone has been unlawfully deprived of his goods, he may lawfully reclaim and take them wherever he happens to find them, so it be not in a riotous manner or attended with breach of the peace, and he can justify an assault made for the purpose of recapturing after demand and refusal (*b*).

(*x*) *Rice* v. *Reed*, [1900] 1 Q. B. 54 [C. A.].
(*y*) 2 Wms. Saund. 47 o; and see *Jacobs* v. *Seward*, L. R. 5 H. L. 464.
(*z*) *Barnardiston* v. *Chapman*, cited 4 East, 121.
(*a*) *Mayhew* v. *Herrick*, 7 C. B. 229.
(*b*) *Blades* v. *Higgs*, 30 L. J. C. P. 347.

Art. 143.

ART. 143.—*Remedy by Action of Replevin.*

The owner of *goods distrained* is entitled to have them returned upon giving such security as the law requires to prosecute his suit without delay against the distrainer, and to return the goods if a return should be awarded (*c*).

The application for the replevying or return of the goods is made to the registrar of the county court of the district where the distress was made, who thereupon causes them to be replevied to the person from whom they were seized, on his giving sufficient security. The action must be commenced within one month in the county court, or within one week in one of the superior courts; but if the plaintiff intends to take the latter course, it is also made a condition of the replevin bond that the rent or damage, in respect of which the distress was made, exceeds £20, or else that he has good grounds for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, is in dispute (*d*).

ART. 144.—*Orders for Restitution of Stolen Goods.*

If any person who has stolen property is prosecuted to conviction by or on behalf of the owner, the property is to be restored to the owner, and the court before whom such person is tried has power to order restitution of the property to the owner (*e*).

Therefore, even if the goods were sold by the thief in market overt, yet, by this section, they must be given up to the original owner.

(*c*) See County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 134—137.
(*d*) 51 & 52 Vict. c. 43, ss. 133—136.
(*e*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100.

QUESTIONS

ON

UNDERHILL'S TORTS.

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NOTE.

THESE questions have been drawn up with a view to assisting students in mastering the principles of the Law of Torts, and in testing their knowledge of that subject by reference to the pages of the present work. They are not, therefore, necessarily such questions as it would be fair to set in an examination, though no doubt many of them would be suitable for that purpose. The numbers at the end of each question give the pages where the required information can be found.

QUESTIONS.

1. Define "tort," and give reasons for your definition. [7—11.]

2. Discuss the definition of a tort as "a wrong independent of contract." [7, 37—41.

3. Explain and illustrate the distinction between "tort," "crime," "breach of contract," "breach of trust," and moral turpitude. Does the fact that a wrongful act (or omission) happens to fall under more than one of these heads affect the common law remedy? [9, 28, 29, 31—35, 37—41, 217.]

4. What elements are combined in the legal conception of "tort"? Give illustrations of each. [8—20.]

5. Discuss and illustrate the maxim that *injuria sine damno* is actionable, but *damnum sine injuria* is not. What is the precise meaning of the words *damnum* and *injuria* in this connection? [8—14.]

6. When is actual damage a necessary part of the cause of action in tort, and when is it not? [9, 10.]

7. A man is unlawfully detained for a short time, but so as to suffer no loss whatever thereby either in money, health, comfort, or otherwise. On another occasion he is, by fraudulent misrepresentations as to existent facts, deceived into a belief, which, if he acted on it, would result in pecuniary loss to him; but he finds out the fraud in time and does not in fact suffer any loss whatever. Can he maintain an action against the person (a) who detained him, (b) who deceived him? [9, 12.]

8. Distinguish, with illustrations, between—

(a) An absolute private right;
(b) A qualified private right; and
(c) A public right.

What is the importance of these distinctions in relation to the law of torts? [9—12.]

9. Under what circumstances can an individual maintain an action for damages for the infringement of a public right? Give illustrations. [10, 31—35.]

10. Give instances of unlawful acts which, though causing damage to particular individuals, nevertheless give rise to no action for damages at common law. [10—28.]

11. Illustrate and explain the distinction between a public and a private nuisance. Under what circumstances can an action for damages be brought in respect of the former? [10, 217, 225.]

12. A. walks on B.'s land without having any legal right to do so but without doing any damage to it. Can B. maintain an action against A.? Would it make any difference if A. had merely stepped on B.'s land in order to avoid being run over by C.'s motor car? [10, 268.]

13. A. owns a shop which greatly depends for its custom upon its attractive appearance; a gas company erects, on its own land, a gasometer, hiding the shop from the public and thereby seriously damaging A.'s trade. Can A. maintain an action for damages against the company? Give reasons for your answer. [9, 225, 226.]

14. A landowner by working his mines causes subsidence of the surface, resulting in the collection of rainwater which percolates into his neighbour's mine and thereby causes trouble and expense to the neighbour. Can the latter maintain an action for damages? [191—194.]

15. A., a legally qualified voter, of Conservative views, duly tenders his vote at a parliamentary election to the returning officer, who wrongfully refuses to register it. The Conservative candidate is returned by a large majority. Has A. any cause of action against the returning officer, and, if so, on what principle? [9, 10.]

16. A. unlawfully obstructs a public highway, thereby delaying B., amongst other members of the public in passing along it. Can B. maintain an action for damages against A.? [218—221.]

17. A. leaves an unfenced hole on his land immediately adjoining a public highway. B., passing along in the dark, falls into the hole and breaks his leg. Can B. maintain an action for damages against A.? [218—221.]

18. A. keeps a coffee-house in a narrow street. His neighbour B. carries on a business as auctioneer, and is constantly loading and unloading goods into and from vans in the street to such an extent as to create a public nuisance and to obstruct A.'s business and inconvenience A.'s customers. Can A. maintain an action for damages against B., and, if so, on what principle? [220.]

19. A.'s servant is so seriously injured in a railway accident due to the negligence of a signalman employed by the railway company, that A. loses his services for six months. Can A. maintain an action for damages against the company? If, instead of being injured, the servant is killed outright, can A. maintain an action? [73.]

20. To what extent is the voluntary nature of the wrongful act or omission an essential element in a tort? [12—14.]

21. Is it ever a good defence to an action for tort, to show that the wrongful act was done in pursuance of instructions received from a third party and was not known by the defendant to be wrongful? [12—14, 54.]

22. Which, if any, of the following would constitute a good defence to an action for damages in tort—

(a) that the defendant did not intend to do harm;

(b) that he did not know his act was illegal;

(c) that the damage done would not have happened but for an accident, which could neither be prevented nor foreseen;

(d) that the act which did the damage was done by leave of the person damaged. [12, 14—19, 27.]

23. A butcher's man leaves his horse and cart unattended in the road while he serves meat at the back door of a neighbouring house in accordance with his usual custom. The horse, which has generally remained quite quiet under such circumstances, is frightened by a motor car, runs away and injures a lady. Has the lady a cause of action against the butcher's man? [16—18.]

24. A. has an unguarded pit on his premises. B. coming on to the premises on lawful business, falls into the pit and is seriously injured. Has B. a cause of action against A., and why? [171.]

25. A. plants a yew tree in his back garden, and in course of time it grows so as to project into B.'s meadow. One of B.'s horses kept in the meadow eats the projecting shoots and dies in consequence. Under what circumstances and on what principle, if at all, has B. a cause of action against A.? [191—195.]

26. A.'s coachman is driving quietly along a street when the horse, without warning or any explainable cause, bolts, and in spite of the coachman's utmost efforts, swerves on to the footpath and knocks down B., a passer-by, injuring him severely. Assuming

that the coachman was a man of skill and experience, has B. any cause of action against A.? Give reasons for your answer. [185.]

27. A., a guest at a shooting party, accidentally, without intending to do so and without being guilty of negligence or want of care in the use of his gun, shoots B., another guest, in the leg. Has B. any cause of action against A.? [12—14.]

28. Illustrate the principle that a man must be presumed to intend the probable consequences of his voluntary acts or omissions. [12.]

29. A. wrongfully throws a lighted squib at B., who, in self-defence wards it off so that, without either of them intending it, the squib explodes in C.'s eye and blinds him. Can C. maintain an action for damages against A. and B., or either of them? [12—19.]

30. Is the nature of the motive with which the act was done ever an essential ingredient in tort? Does an evil motive ever make wrongful an act which would otherwise be justifiable? Does a good motive ever make justifiable an act which would otherwise be wrongful? [14—16, 118-128, 137, 138, 158, 225, 226.]

31. In what senses is the word "malice" used in connection with (a) malicious prosecution; (b) libel and slander; and (c) other torts generally? [14, 124, 137.]

32. Is it a tort to induce a person (a) to break a contract, (b) to refrain from making a contract? [153—157.]

33. A. walks across B.'s land under the honest but mistaken belief that there is a public right of way across it. Is his belief a good defence to an action for trespass? [12.]

34. A. purchases from B. goods which he believes to be B.'s, but which are in fact C.'s property. What is A.'s liability towards C.? [279—283, 286—288.

35. What is meant by an Act of State? [20.]

36. What is the difference between a judge of a superior court and a judge of an inferior court as regards immunity from actions for things done by them in their judicial capacity? [21-23.]

37. To what extent is the civil remedy in damages interfered with when the wrongful act or omission amounts to a felony? [28—30.]

38. A. has innocently bought goods from B., who has stolen them from C. Can C. bring an action against A. without prosecuting B. for the theft? [29, 279—284.]

39. To what extent can a duty or right created, or declared, by statute, be enforced at common law; and in what cases is the common law action for damages excluded? [31—35.]

40. Where a duty is created by statute for the benefit of the public, is a person, who, by reason of another's neglect of the statutory duty, suffers a loss, entitled to maintain an action for damages in respect of such loss? Give an instance. [32.]

41. Explain and illustrate the distinction between actions in "tort" and in "contract," respectively. Is there any practical importance nowadays in this distinction? [37—41.]

42. If in a railway accident, occurring through negligence on the part of the railway company's servants, a passenger is injured, does his remedy lie in contract or in tort? [37.]

43. A man pledges a coat at a pawnbroker's, and owing to the latter's negligence it becomes ruined by moths. Discuss the question whether the owner's remedy is in contract or in tort. [37, 176.]

44. What is meant by privity of contract? Has it any application to tort? A man employs a surgeon to attend to his wife. Owing to the surgeon's negligence, the patient is injured. Has she any remedy at law, and, if so, on what principle? [38—40.]

45. A., a domestic servant, going by train from London to Birmingham, loses his luggage owing to the negligence of the railway company's servants. His fare had been paid by B., his master. What remedy has A. against the company? [39.]

46. A. goes to a gunmaker and explains to him that he wants a good, sound gun for the use of himself and his son B. The gunmaker sells him a gun which he warrants to be perfectly sound. A few days later B. goes out shooting and the gun bursts and seriously damages his face. Has he any remedy, and, if so, on what principle, against the gunmaker? [39, 40.]

47. If a person gratuitously undertakes to perform a service for another person, can he be made liable for (a) not performing it, or (b) performing it so negligently that damage results to the other person? Give your reasons. [40.]

48. A. intrusts a purse of money to the care of B. who gratuitously undertakes the custody of it. Through B.'s negligence the purse and its contents are lost. Has A. any remedy against B., and, if so, on what principle? [40, 41.]

49. A., walking along the road, is overtaken by a motor car driven by B., a "chauffeur," whom he knows slightly, and who offers him a "lift." A. rashly accepts the invitation, and in consequence breaks his arm in an accident (caused solely by B.'s negligence) which terminates the excursion. Has A. any remedy against B. or B.'s employer, and, if so, on what principle? [41, 55—63.]

50. Under what circumstances, if at all, is an action for damages maintainable in England in respect of a tort committed abroad? [43, 44.]

51. Who may be plaintiff in an action for tort? State any exceptions to the general rule. [45.]

52. Can a husband sue his wife, or a wife her husband, in tort? [45.]

53. Can a corporation sue in tort precisely as if it were an individual person? [45, 104, 108.]

54. Who may be made a defendant in an action for tort, and what classes of persons are exempt from such liability? [46.]

55. An infant hires a horse for the afternoon expressly for riding on the roads. He tries it at a fence and breaks its knees. Can he be made liable (a) for the damage done to the horse's knees: (b) for the hire, which he has omitted to pay? [47.]

56. Discuss the liability of infants, lunatics, corporations, and trades unions in tort. [46—49, 61.]

57. To what extent is a husband liable for torts committed by his wife? Is it ever necessary to join him as a defendant? [51.]

58. Explain and illustrate the maxim "*qui facit per alium facit per se*" in its application to torts. [54.]

59. Explain the maxim "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*" To what extent is it applicable in tort? [55.]

60. Explain the maxim "*delegatus non potest delegare*," and give illustrations of its application in tort. [61.]

61. If a cabdriver (whose duty it is to drive the cab himself) allows the "fare" to drive, and the latter drives so badly as to collide with and damage a private carriage, is the owner of the cab liable to the owner of the carriage for the damage done; and if so, on what principle? [62.]

62. A driver of a cart negligently leaves the cart in charge of a small boy, whose duty it was to go with the cart to deliver parcels, but who had been forbidden to drive. The boy drives the cart and collides with a private carriage. Is the tradesman, who employs the driver and the boy, liable for the damage done to the carriage; and, if so, on what principle? [62.]

63. State precisely the liability of a person for the wrongful acts and omissions of a contractor employed by him to do a particular piece of work. [63.]

64. A railway company was empowered by Act of Parliament to construct a railway bridge over a public highway, and employed a contractor to do the work. A servant of the contractor negligently caused serious injury to a person passing along the highway by allowing a stone to fall on him. Discuss the liability of the company for the damage done to the injured individual. [65.]

65. A company, not authorised to interfere with certain streets, directed their contractor to open trenches therein. The contractor's servant, in doing so, left a heap of stones, over which a person fell and was injured. Discuss the liability of the company for the damage done to this person. [52—54.]

66. A company, being authorised by Act of Parliament to construct a bridge over a navigable river, employed a contractor to do the work. A person, who suffered damage by reason of defects in the construction and working of the bridge, sues the company. On what principle, if at all, is his action maintainable? [66.]

67. A. and B. are owners of two adjoining houses, A. being entitled to have his house supported by B.'s soil. B. employs a contractor to pull down his house, excavate the foundations, and rebuild the house. The contractor undertakes the risk of supporting A.'s house during this process, but fails to take the necessary precautions. Is B. liable to A. for the consequent damage to A.'s house; and, if so, on what principle? [66.]

68. A. maintains a lamp hanging over a highway for his own purposes. He employs a contractor to repair it; but the latter does his work so badly that soon afterwards the lamp falls down

and hurts B., a passer-by. Is A. liable to B. in damages: and, if so, why? [67.]

69. A contractor, employed to clear and burn brushwood on land belonging to A., negligently and in disregard of express instructions as to the time of lighting the fire, lit it and permitted it to spread on to the land of B. Is A. liable in damages to B. for the injury thus done to B.'s land; and, if so, on what principle? [67.]

70. A., being the owner of a carriage, horse, and harness, and losing his coachman at short notice, gets another for the day from a livery-stable keeper, and is driven out by him. Discuss the liability of A. for damage done to a stranger by reason of the negligence or want of skill of this hired driver. [56, 57.]

71. A. having a carriage, but no horse or harness, hires these for the day from a livery-stable keeper, who also supplies him with a driver on inclusive terms, so that A. does not pay the driver's wages direct to the latter. Discuss the liability of A. for damage done by the driver to B.'s carriage in a collision. [56, 57.]

72. A., having a coachman to spare, lends his services for the day to B., who is short of one. Discuss the liability of A. and B. for damages done to C. by the coachman while driving B.'s carriage and horses. [56, 57.]

73. A., being the owner of a motor car, leaves it in charge of a "chauffeur" with instructions to call for him at a certain place that afternoon. In A.'s absence during the morning the "chauffeur" takes his sweetheart for a drive in the car (an event not contemplated by A.), and during the drive negligently collides with and damages B.'s carriage. Discuss A.'s liability to B. for the damage done. [56, 58.]

74. An omnibus conductor, for the fun of the thing, changes places with the driver and drives the omnibus so unskilfully that he collides with and damages a private carriage. Discuss the liability of the omnibus company. [56, 59.]

75. A bank manager, in answer to inquiries by A. as to the financial position of B. (a customer of the bank), replied that B. is a person of sound financial position. This statement was known by the bank manager to be untrue when he made it, and was made, not for his own benefit but for the benefit of the bank, with intent to deceive A. Advise A. as to whether, having suffered loss by acting on the faith of this statement, he has a cause of action against the bank. [56, 59, 165.]

76. An omnibus driver, contrary to the express instruction of his employers, drives in such a way as to obstruct a rival omnibus, with a view of increasing the takings of his own. Discuss the liability of his employers. [59.]

77. An omnibus driver, out of spite against a rival omnibus, struck the horses of the latter with his whip. Discuss the liability of the driver's employers. [59.]

78. What is meant by the doctrine of "common employment"? On what principle is it based and to what extent has it been cut down by modern legislation? [203—211.]

79. A butcher's man was ordered to deliver meat from a van. The van, having been overloaded by the negligence of another of the butcher's servants, broke down, and the butcher's man was hurt thereby. Can the butcher's man maintain an action for damages against his employer? [205.]

80. Owing to the negligence of the captain of a merchant vessel, one of the crew is seriously hurt. Discuss the liability of the owners. [206.]

81. Owing to the negligence of the captain of ship A., it collides with ship B., and one of the crew of the latter ship is seriously injured thereby. Both ships belong to the same owner. Discuss his liability for the damage done to the injured man. [207.]

82. A collier is seriously injured by the fall of a stone from the side of the shaft, which has been left in a dangerous state by his employers. Discuss their liability in damages. What must the plaintiff prove in order to succeed in his action? [204.]

83. A master orders a servant to take a bag of corn up a ladder which is unsafe; the ladder breaks and the servant falls down and is injured. Discuss the liability of the master, on the alternative assumptions that (a) he knew the ladder was unsafe, but the servant did not; (b) he did not know, but the servant did; (c) both knew; and (d) neither knew nor had the means of knowing. [204, 209.]

84. What is meant by the maxim "*volenti non fit injuria*"? Discuss its application to the case of injuries sustained by a servant employed in a dangerous occupation. [187—189, 210.]

85. A passer-by assists a carman in managing a fractious horse. In course of doing so, he himself gets injured owing to the carman's negligence. Discuss the liability of the carman's employer for the damage done to the passer-by, on the assumption that the latter was asked by the carman to give his assistance. [208.]

86. Explain and illustrate the liability of a partner for the torts of his fellow partner. [53.]

87. One member of a firm libels a stranger. Can the latter sue the firm in damages, and, if so, on what principle? [53.]

88. From what period do the Statutes of Limitation commence to run in the case of torts? [94.]

89. In 1895 A. began to work coal under the land on which B.'s house stands. In consequence of this working, a subsidence occurred in 1900, and B.'s house was damaged. In 1904 B. commenced an action for damages against A. What facts, besides the above, would be of importance in deciding the case for or against B.'s claim? [95.]

90. A.'s furniture was legally seized under an execution by the sheriff and bought by B., a friend, who, out of kindness, left it in A.'s possession where it remained for ten years, at the end of which A. died. B. then claimed it, but A.'s widow pleaded the Statute of Limitations. Discuss their respective claims to the furniture. [95.]

91. State and illustrate the effect of the fraudulent concealment of a tort on the right of the person injured to maintain an action for damages. [94.]

92. In what respects do the Statutes of Limitation differently affect the rights of a person to recover (a) land, (b) goods, of which he has been wrongfully deprived? [96.]

93. Explain and illustrate the application of the Statutes of Limitation to a continuing tort. [96, 97.]

94. What is meant by "disability," in relation to the Statutes of Limitation, and what is the effect of it? [97, 276.]

95. To what extent are public officers and authorities specially privileged in relation to actions in tort? Does the privilege extend to their servants and agents. [98, 99.]

96. What is the measure of damages in actions for tort (a) in respect of personal injury, and (b) in respect of injury to property? [77—80.]

97. On what principles and under what circumstances, if at all, can the verdict of a jury, in regard to the amount of damages given in respect of a personal injury, be disturbed? [77.]

98. What considerations may be taken into account by the jury in estimating damages in a case of seduction? [83, 84, 150, 151.]

99. What is the proper measure of damages for injury done to a horse through the negligence of a person who had hired it from the owner? [78—80.]

100. A., a colliery owner, wrongfully worked coal lying under the land of his neighbour B. State precisely the proper measure of damages that should be awarded to B. [79.]

101. Explain and illustrate in its application to torts the maxim "*omnia præsumuntur contra spoliatorem.*" [80.]

102. Explain and illustrate what is meant by (a) "consequential damages," and (b) "prospective damages." [81—83.]

103. In an action for personal injury, what kind of consequences of the injury can be taken into account in the assessment of damages? Give illustrations. [81, 82, 85.]

104. What circumstances may be considered by a jury to be in (a) aggravation, and (b) mitigation, of damages? Give illustrations in cases of (1) defamation, (2) assault and battery, and (3) trespass. [83, 84.]

105. What is the legal position of persons who have jointly committed a tort? [49, 50.]

106. What are the effects of—

(a) A judgment being given against one of several tort-feasors;

(b) A release being given to one of them;

(c) A covenant not to sue being made with one of them;

(d) Damages being levied upon one of them on a judgment given against them all jointly? [49, 50.]

107. Discuss the proposition that "there is no contribution between tort-feasors." [49.]

108. Explain and illustrate the application of the remedy by injunction to various kinds of torts. [87—91.]

109. Distinguish between interlocutory and perpetual injunctions as remedies in cases of torts, and illustrate the principles on which they will respectively be granted. [87—90.]

110. To what extent is either (a) public convenience, or (b) statutory authority, a justification of the continuance of a tort? [24—27, 90, 91.]

111. What is the effect on an action of tort, of the death of (a) the plaintiff, or (b) the defendant? To what extent does it depend on the nature of the tort itself? [69, 70.]

112. What is meant by "*actio personalis moritur cum persona*," as applied to actions in tort? State and illustrate the exceptions to this rule. [70.]

113. Explain and illustrate the provisions of Lord Campbell's Act. [71—75.]

114. What is the effect on a right of action in tort of the bankruptcy of (a) the person who has suffered the wrong, or (b) the person who has caused it? [70, 71.]

115. Define and analyse "libel" and "slander." In what principal respects do they differ from one another? [103, 104, 108.]

116. What is meant by "defamatory" statements? Give illustrations of what would be considered defamatory, and what would not. [104.]

117. A financier, who is also a candidate for Parliamentary election, having been styled a "shady customer" in a leading article of a newspaper of the opposite political persuasion, brings an action for libel against the proprietor, editor, printer, and various newsagents who have sold copies of the paper. Indicate the defences which they can respectively set up. [114—120.]

118. Under what circumstances, if at all, can a statement be held defamatory, which taken in its literal sense conveys no offensive meaning whatever? [106.]

119. Is it a libel to write (falsely and maliciously) of a tradesman that the goods he sells are of the worst possible quality? [107, 130.]

120. What is slander of title? [130.]

121. What is meant by "special damage" in relation to actions for slander, and what classes of slanders are actionable without proof of such damage? [108—112.]

122. Define and illustrate "publication," in connection with a libel or slander. [114.]

123. A solicitor acting for a client dictates a letter to his typewriting clerk. The letter contains certain statements relating to the person to whom it is addressed, which are defamatory and untrue (though believed to be true by the solicitor at the time of dictating the letter). Is the solicitor liable in an action for libel at the suit of the person to whom the letter is addressed? [115, 127.]

124. What is the liability of a street newsvendor for libels contained in the newspapers he sells? [117.]

125. A. falsely and maliciously tells his wife that B., another lady, is an adulteress. Can B. maintain an action against A. for this slander? [115.]

126. A. falsely and maliciously tells B. that her husband C. has recently committed a criminal offence. Can C. maintain an action for slander against A.? [115.]

127. What is meant by "justification" as a defence to an action for libel? On what principle does it depend? [117.]

128. What is meant by "fair comment" in relation to the law of libel and slander? Illustrate the limitations to which it is subject. [118—120.]

129. Explain and illustrate the expressions "actual malice" and "privileged occasion" in relation to an action for libel or slander. [123—128.]

130. Distinguish between "absolute" and "qualified" privilege in relation to libel and slander, and give instances of each. [120, 123.]

131. What are the functions of a judge and jury respectively in regard to the questions of "privileged occasion" and "privileged communication" in an action for libel? [123.].

132. In what respects has the ordinary law of libel been modified in favour of newspaper proprietors and editors? [122, 129.]

133. C. is an applicant for an appointment in B.'s business. In reply to an inquiry by B. as to C's. character, A. writes a letter which, amongst other things, contains an untrue defamatory statement about C., made, however, by A. in the belief that it is true, and that he ought to mention it. Having written the letter, A. negligently puts it into a wrong envelope, so that it ultimately reaches D., who informs C. of its contents. Can C. maintain an action against A.? [126, 127.]

134. To what extent is a person who repeats (a) a libel or (b) a slander, liable equally with the originator of it? [115, 117.]

135. A. slandered B. in C.'s hearing. C., without authority, repeated the slander to D., in consequence of which D. refused to trust B. Does an action for slander lie against A., and, if so, why? [115, 117.]

136. What is the statutory limitation applicable to actions for libel and slander? [93.]

137. Define and analyse "malicious prosecution." [133—140.]

138. What is meant by "want of reasonable and probable cause" for instituting a prosecution? In an action for malicious prosecution (a) on whom does the onus lie of proving, and (b) what are the functions of a judge and jury with regard to, the facts material to this part of the case? [135—137.]

139. Define "maintenance." In what respects does it differ from "malicious prosecution"? [143.]

140. Illustrate and explain what is meant by a "common interest" in relation to actions for the tort of maintenance. [143, 144.]

141. What is the legal principle on which actions for seduction are based? [145—149.]

142. Frame and discuss a definition of common law fraud or deceit, as a tort, and distinguish it from such misrepresentation as would, in equity, be a ground for rescinding a contract. [161—164.]

143. Explain the decision in *Derry* v. *Peek*. [162—166.]

144. What is the statutory liability of directors of joint stock companies in regard to untrue statements contained in a prospectus inviting subscriptions for shares? [165.]

145. Under what circumstances can a man be made liable in tort for the untrue statements of his agent? [165.]

146. A., a secretary of a company, by false statements induces B. to take shares in the company. Is the company liable for the fraud of the secretary? [165.]

147. Does silence ever amount to fraud? [161, 162.]

148. A., an opera-house manager, engages a singer to perform in an opera. B., manager of a rival opera-house, hears of this and offers the singer a sum of money to break her contract with A. and to sing in B.'s opera. She does so, with the result that A. sustains a loss. Can A. maintain an action for damages against B., and, if so, on what principle? [153.]

149. Define "negligence." Under what circumstances is it wrongful, so as to give rise to an action for damages in tort? Give illustrations. [167.]

150. A. lends B. his gun to shoot game with. If the gun explodes and injures B., would A. be liable in damages? [177—180.]

151. It is sometimes said that every dog is legally entitled to one bite. Discuss and explain this statement. [196.]

152. A., a neighbour permitted to cross B.'s land in order to go by a short cut to his own house, goes on to B.'s land in the dark and falls into an unfenced pit. Discuss the circumstances, if any, which would entitle him to maintain an action for damages against B. [171—173.]

153. Explain and illustrate what is meant by "contributory negligence." Is it always a good defence? Give illustrations. [181—184.]

154. An omnibus comes into collision with a hansom cab, both drivers being to blame for negligence in driving. The hansom is damaged and a person in it is injured in the collision. Has (a) the owner of the hansom, or (b) the "fare," any remedy in damages against the omnibus company? [181—184.]

155. What is the effect of the decision in *The Bernina*? [183.]

156. A., a landowner, negligently allows a fence on his land adjoining a public highway to get into a rotten condition. B., a little boy, attempts to climb the fence (which he has no right to do); the fence falls down and injures him. Can he recover damages from A.? [219.]

157. Illustrate the principle that in an action founded on negligence the negligence of the defendant must be the proximate cause of the damage. [184.]

158. Will (a) negligence, (b) contributory negligence, ever be presumed, or must they be proved in every case? and, if so, on whom does the onus lie and what are the functions of the judge and jury respectively in relation thereto? [185.]

159. Define "public nuisance." Under what circumstances does a public nuisance give rise to an action for damages? [217—221.]

160. Define "private nuisance," and give illustrations of each. [225—248.]

161. What is the liability in tort of a highway authority for injury to an individual by reason of the highway being allowed to fall into disrepair? [33—35.]

162. In an action for damages in respect of a nuisance, is it a good defence to show that the plaintiff knew of it and nevertheless deliberately went to live in its vicinity? [230.]

163. How, if at all, can the right to commit a nuisance be acquired? [24—27, 232.]

164. What is the liability of the landlord and tenant respectively by reason of the premises being in such a ruinous condition as to constitute a nuisance? [221, 231.]

165. Give illustrations of nuisances affecting incorporeal hereditaments. [237—248.]

166. To what extent is a man entitled to lateral support from his neighbour's land? [241.]

167. Explain what is meant by disturbance of a right of light. How can an easement to light be acquired, and what constitutes a disturbance of the easement? [242—245.]

168. Explain and illustrate the law relating to rights to water. [245—248.]

169. Explain and illustrate what is meant by the "abatement" of a nuisance. Under what circumstances must this remedy be preceded by notice to the person committing the nuisance? [221, 235, 236.]

170. Branches of a tree growing in A.'s garden overhang the intervening wall and spread over into B.'s garden. Is B. entitled to cut them down? [236.]

171. What are the rights and remedies of a reversioner in respect of nuisances to the property? [234.]

172. Define and illustrate—

(a) Assault;
(b) Battery;
(c) False imprisonment.

Can a threat ever amount to an assault? [249—253.]

173. What is mayhem? [251.]

174. What are the defences to an action founded on assault, battery or false imprisonment? Give illustrations. [254—264.]

175. Under what circumstances does an action lie against a magistrate who has exceeded his jurisdiction and wrongly imposed a sentence of imprisonment? [21, 22.]

176. Under what circumstances can (a) a justice of the peace, (b) a constable, and (c) a private individual, lawfully arrest a person? Give illustrations. [258—263.]

177. What is a trespass *quare clausum fregit*? Give illustrations. [267.]

178. What are the defences to an action for trespass to another man's land? Explain what is meant by the plea of *liberum tenementum*. [268, 269.]

179. What is meant by a trespasser *ab initio*? Explain the decision in the *Six Carpenters' Case*. Does the principle apply to goods as well as to land? [269—286.]

180. What interest in land must a plaintiff have in order to maintain an action for trespass? Can an action for trespass be maintained by one of two joint owners against the other? [270, 272.]

181. What is distress *damage feasant*? [273.]

182. Define and illustrate "dispossession." [274.]

183. To what extent can either of the parties to an action for the recovery of land set up *jus tertii*? [275.]

184. What is the period of limitation for actions for the recovery of land, and when does it begin to run? [276, 277.]

185. Define and illustrate trespass to goods. What is wrongful conversion? [279.]

186. Under what circumstances does a bonâ fide purchaser of goods from a person who obtained them fraudulently from the true owner get a good title to them? [282, 283.]

187. Illustrate possible defences to an action for trespass to another's goods. [283, 284.]

188. What is meant by (a) "constructive possession" and (b) "possession by relation"? [284, 285.]

189. Explain the decision in *Armory* v. *Delamirie*. [80, 288.]

190. A. lends an umbrella to B., who leaves it in the hall of his club, whence it is removed by C., who now claims that it is his. Which of the two, A. or B., has the right to maintain an action against C.? [285.]

191. Under what circumstances can one joint owner of a chattel maintain an action for trespass in respect of it against the other joint owner? [276.]

192. If the plaintiff in an action for conversion gets judgment against the defendant, is the defendant bound to return the goods? In whom is the property after judgment? [286, 287.]

INDEX.

A.

ABATEMENT
of action. *See* DEATH.
nuisance, 235.
cutting overhanging trees, 236.
not proper remedy to prevent prospective nuisance, 235,
pulling down buildings, 236. 236.
inhabited house, 236.

ABROAD,
liability for torts committed, 43 *et seq.*

ABSOLUTE RIGHT,
infringement of, without damage, constitutes a tort, 7, 9.

ACCIDENT,
actionable, if preventable, 13,
if inevitable, not actionable, 12 *et seq.*
And see NEGLIGENCE ; NUISANCE.
when occurrence of, primâ facie evidence of negligence, 185, 186.

ACT OF GOD
excuses what would be otherwise actionable, 191 *et seq.*

ACT OF STATE,
no action can be brought for damage resulting from, 20.
whether between two independent states or between a state and an individual foreigner, 20.
not easily defined, 20.
what is, 20, 21.

ACT OF THIRD PARTY,
where damage partly caused by, 194.

ADOPTION. *See* RATIFICATION.

ADVERTISEMENTS,
criticism of, privileged, 119.

ADVICE,
confidential, a privileged communication, 125.

AGENTS
cannot shelter themselves behind their principals, 54.
general liability of principal for torts of, 54.
where agent expressly employed to commit tort, 54.
no liability in general for collateral negligence of agent, 63.
unless he is a servant, 56 *et seq.*
who is a servant, 56 *et seq.*
wilful acts of servants, 59.
arrests by, 59.
assaults by, 60.
And see MASTER AND SERVANT.

AGGRAVATION. *See* DAMAGES.

AIR,
when action lies for obstruction of, 244.

ALIEN ENEMY
cannot sue, 45.

AMBASSADORS
not liable for torts, 46.
but may waive privilege, 46.

ANIMALS. *See* FEROCIOUS ANIMALS.
damage by, 196 *et seq.*
bulls, 198.
dog "accustomed to bite mankind," 197.
biting and worrying sheep, 197.
domestic animals, trespass by, 199.
highway, straying from, 198.
on, 198.
if dangerous, kept with knowledge, no negligence need be proved, 197.
in suing for damages caused by dangerous, *scienter* must be proved, 197, 198.
liability of persons keeping elephants, bears and monkeys, 196.
wild and vicious, 196.
owner of vicious dog liable for servant's wrongful act, 199, 200.
persons keeping dog or other domestic, no liability of, 196.
servant's knowledge that dog is dangerous, 197.
trespasser bitten by horse, occupier of land not liable, 199.
injuries done to, 283.
killing in self-defence, justifiable, 283.
trespasses of, 267.

ARREST. *See* IMPRISONMENT.

ARTIFICIAL WATERCOURSE. *See* WATERCOURSE.

ASSAULT AND BATTERY,
amount of damages, 265.
aggravation a mitigation, 83, 84.

ASSAULT AND BATTERY—*continued.*
definition of assault, 250.
ability to do harm, necessary, 250.
attempt necessary, 251.
committed in sport, not actionable, 251.
menacing, 250.
definition of battery, 251.
battery voluntarily suffered, not actionable, 252.
caused by inevitable accident, excusable, 252.
committed in mere retaliation, not justifiable, 255.
defence of property, 255.
injuries inflicted through defective tramway, 252.
in order to arrest night offender, felon, malicious trespasser, or vagrant, 263.
in order to expel disturber of congregation, justifiable, 263.
in order to stop breach of the peace, 254, 262.
by naval or military officers, 256.
justification for, 254 *et seq.*
may be occasioned by anything wrongly and wilfully or negligently set in motion by defendant, 252.
mayhem, 251.
of pupil or child for sake of correction, 256.
self-defence, justifiable, 255.
on person having ticket for grand stand and enclosure at races, 255.
refusing to leave after being requested to, 255.
proceedings before justices release civil proceedings, 264.
responsibility of master for, by servant, 60.

B.

BAILEE. *See* TRESPASS.

BAILEES OF GOODS,
common carriers, meaning of, 177.
duty of, 176.
degree of care required, varies with nature of the bailment, to take reasonable care of goods bailed to them, 176. 176.
liability of, 176.

BAILOR
may bring trespass against third party or purchaser, where bailee has wrongfully delivered or sold goods, 287.
unless sale in market overt, 282.
and even then if goods stolen and thief convicted, 283.

BANKRUPTCY,
effect of, on the right to sue or the liability to be sued for tort, 70, 71.

BATTERY. *See* ASSAULT AND BATTERY.

BODILY INJURIES. *See* ASSAULT.
caused by false imprisonment. *See* IMPRISONMENT.
negligence. *See* NEGLIGENCE.
nuisances. *See* NUISANCE.

BREACH OF DUTY.
escape of water accumulated by natural causes, not a, 194.
falling on land, is not a, 194.
liability for, to prevent damage from dangerous things and animals, 191 *et seq.*
planting yew trees and thistles, when a, 195.
not a, 195.
supply pipes bursting, not a, if not for defendant's own use, 195.
third party bringing thing on land, defendant not liable for, 194.
water stored in a tank is not a, 195.
when caused by act of God, 194.

BRICK-BURNING
may be an actionable nuisance, 228.

C.

CABDRIVER,
who liable for negligence of, 57.

CAMPBELL'S (LORD) ACT, 71 *et seq.*
action can only be maintained in cases where deceased himself could have sued had he lived, 73.
action not maintainable when deceased received compensation before death, 75.
effect of deceased having insured his life, 75.
gives right of action to relatives of persons killed through another's default, 71 *et seq.*
if servant injured but not killed, master may bring action for loss of services, 73.
jury must apportion damages, 72.
master cannot bring action for damages which cause the immediate death of his servant, 73.
plaintiff must have suffered some pecuniary loss attributable to the relationship, 74.
what damage must be proved, 74.
when action maintainable, 73.
for whose benefit maintainable, 73.
when assessing damages insurance not to be taken into account, 75.
who may sue, 73.
in case executor does not, 72.

CANDIDATE
for office, character of, privileged communication, 126.

CATTLE OR SHEEP. *See* TRESPASS.
when injury is done to, by dog, *scienter* need not be shown, 197.
word "cattle" includes horses, 197.

CAVEAT EMPTOR, 161 *et seq.*

CHARACTER,
evidence of plaintiff's bad or irritating character or conduct in mitigation of damages in defamation, 84.
fraudulent, when actionable, 163.
of candidate for office, given to a voter or elector, a privileged communication, 126.
daughter's loose character in mitigation of damages in seduction, 84.
servant, when a privileged communication, 125.

CHATTELS,
trespass to, and conversion of, 279 *et seq.*
See TRESPASS; *and see* WRONGFUL CONVERSION.

CHILDREN
of deceased parent, action by. *See* CAMPBELL'S (LORD) ACT.

CHURCH BELLS,
injunction to restrain ringing of, 89.

CLERGYMAN,
imputing unchastity to a beneficed, is actionable *per se*, 111.

COERCION
by illegal means, 153 *et seq.*

COMMON EMPLOYMENT,
meaning of, 204 *et seq.*
See MASTER AND SERVANT.
there must be a common master, 207.

COMPENSATION. *See* WORKMEN'S COMPENSATION.

CONCEALMENT,
when fraudulent. *See* FRAUDULENT CONCEALMENT.

CONDUCT,
evidence of plaintiffs objectionable, in mitigation or aggravation of damages, 83 *et seq.*

CONFIDENCE. *See* MISFEASANCE.

CONSEQUENTIAL DAMAGES. *See* DAMAGES.

CONSPIRACY, 155.
not actionable where object is to induce persons not to employ defendant, 156.
aliter where object is to induce persons to break contract, 154, 155, 157.

CONSTABLE
cannot, in general, arrest without a warrant, 263.
definition of, 261.

CONSTABLE—*continued.*
may arrest without warrant—
for acts of vagrancy, 263.
brawling in church, 263.
breach of peace, even after affray over, in order to take offender before a justice, 262.
malicious injuries, 263.
on reasonable suspicion of felony, 260.
power of, to arrest in obedience to warrant, 259.
special protection of, in executing warrants of justices without jurisdiction, 259.

CONTINUING TORTS,
commencement of period of limitation in, 96.
fresh action may be brought for, until they are stopped, 83 *et seq.*

CONTRACT,
gratuitous bailees, 40, 41.
in performance of duties undertaken gratuitously, 40, 41.
negligence of professional men, 39.
servant can sue railway company who have booked him although master paid the fare, 39.
third party injured, as to deleterious quack medicines, 39.
aliter, where fraud, 39.
torts connected with, 37 *et seq.*
waiver of tort and action on implied, 279.
who may be sued for torts connected with, 38 *et seq.*

CONTRACTOR,
employer not in general liable for nuisance committed by, or negligence of, 56, 63 *et seq.*
exceptions, 63—67.

CONTRIBUTION,
how far a right to, between tort-feasors, 49.

CONTRIBUTORY NEGLIGENCE. *See* NEGLIGENCE.

CONVERSION. *See* WRONGFUL CONVERSION.

CORPORATION
is generally liable for torts, 48.
liable for libels and slanders published by its servants, 61.
torts, 48.
even for those depending on fraud, 48.
may sue for a tort unless it merely affects its reputation, 45.

COUNSEL,
opinion of, no excuse for malicious prosecution, 136.
statements of, privileged communications, 122.

CRIME. *See* DEFAMATION.

CRITICISM. *See* DEFAMATION.

D.

DAMAGE
continuance of, under Public Authorities Protection Act, 1893, special, must be some temporal loss, 109. 98.
when necessary, 8 *et seq.*
without wrongful act, not actionable, 8 *et seq.*

DAMAGE BY ANIMALS. *See* ANIMALS.

DAMAGES,
measure of, in actions of tort, 77 *et seq.*
(1) *For injuries to person and reputation*, 86 *et seq.*
aggravation and mitigation of, 83 *et seq.*
for defamation, 84.
seduction, 83, 84.
consequential damages, 81 *et seq.*
injury to trade by defamation, 82.
loss of business, 81, 82.
medical expenses, 81.
mental shock, 81.
excessive, 77.
for assault, 78.
false imprisonment, 78.
seduction, 150.
insurance not to be taken into account, 85.
mistake or ill-feeling of jury, 77.
prospective damages may be given, 82, 83.
too small, 77.
under Employers' Liability Act, 210.
(2) *For injuries to property*, 78 *et seq.*
aggravation and mitigation, 83 *et seq.*
insolent trespass, 84.
compensatory in character, 88.
consequential damages, 81, 82.
collisions at sea, 82.
having been obliged to pay damages to third party, 93.
infectious disease, 81, 82.
must not be too remote, 81.
continuing torts, 83.
cost of repairing chattel, 80.
for wrongful conversion, 79.
joint wrongdoers are jointly and severally liable for, 49.
loss of use of chattel by reason of defendant's negligence, 79, 80.
lightship, having been damaged by collision, 80.
presumption of amount of damage against a wrongdoer, 80.
prospective damages should be included, 82, 83.
aliter, where tort is continuing, 83.
or where distinct torts, one to person and the other to property, 83.
trespass to land, 79.

DAMNUM,
definition of, 8, 9.

DAMNUM ABSQUE INJURIA, 9.

DANGER,
trespass under the influence of a pressing, 268.

DANGEROUS
animals. *See* FEROCIOUS ANIMALS.
substances brought on to land must be kept at peril of bringer, 191 *et seq.*
works, principal liable for contractor's defaults, 64.

DAUGHTER,
action for seduction of, 146.
See SEDUCTION.

DEATH,
effect of, on the right to sue or liability to be sued for tort, 69, 70.

DECEASED PERSON. *See* CAMPBELL'S (LORD) ACT.

DECEIT, 161 *et seq.*
See FRAUD.

DEFAMATION, 103 *et seq.*
actual damage, when necessary, in slander, 108 *et seq.*
damage caused by plaintiff himself repeating the slander, 110.
imputation—
mere suspicion insufficient, 111.
must be of punishable crime, 110.
of crime actual damage of itself, 110.
impossible crime insufficient, 110.
mere breach of trust, 110.
unchastity, 110.
unfitness for business, 111.
office, 111 *et seq.*
society, 111.
analysis of slander, 104.
damages. *See* DAMAGES.
definition, 103, 104.
disparagement of tradesman's goods gives no cause of action, 111.
fair comment, 118 *et seq.*
criticism of such matter of public interest, 119.
tradesmen's advertisements, 119.
decision of court as to whether—
evidence that any part of words complained, go beyond limit of, 118.
matter commented on is of public interest, 118.
defence of, 119.
duty of jury to prove evidence not of, 118.
in, no question of malice arises, 120.
is outside the region of libel, 120.
must be distinguished from privilege, 120.
not actionable if defendant proves bonâ fide, 118.
on public conduct of a public man, 120.
functions of court and jury as to publication, 114.

DEFAMATION—*continued.*
malice, 120 *et seq.*
oral or written, 103.
privileged communications—
criticism, 119.
of public men, 119 *et seq.*
extracts from Parliamentary papers, 127.
function of court and jury, 123.
incidental publication to persons not having interest, 127.
judicial proceedings, 121, 122.
jury to decide whether communication fairly warranted, Parliamentary proceedings, 121. 123.
reports of judicial proceedings, 127.
legal proceedings, 122.
quasi-judicial proceedings, 127.
sending by telegram or postcard or in wrongly addressed envelope, 126.
speeches at county and district councils, 128.
statement made to a person having a corresponding interest, *aliter* where made broadcast, 126. 126.
where character of a candidate is, 126.
servant given to intending employer, confidential advice, 125. 125.
social and moral duty to speak, 125, 126.
warning a guest of character of person in his employ, publication, 114. 125.
by dictating to clerk, 115.
telegram or postcard addressed to person libelled, 114, justification of, 104. 115.
libel or slander must refer to the plaintiff, 113.
to or by husband or wife, 115.
repetition of defamation, 115.
in verbal slander where the damage is wholly in consequence of the repetition, 116.
injunction to restrain, 89, 90.
printing of verbal slander, 116.
slander of title and slander of goods, 129.
may be in writing or in print, 130.
puffing one's own goods, 130, 131.
special damage, 131.
what is, 129, 130.
truth of defamatory statement a good defence, 117.
waxen effigy, 108.
when a corporation may sue, 108.
actionable, 103, 104.
where no disparagement no amount of damage will give a cause of action, 107, 108.
words capable of bearing a defamatory meaning, 105.

DEFAMATORY ARTICLE,
publication of, 13, 113.
liability of publishers, 13, 113.

DEFECT. *See* FRAUD.

DEFENCE. *See* ASSAULT.

DETINUE,
meaning of, 279.

DISABILITY
to sue or to be sued for tort, 45 *et seq.*
See LIMITATION.

DISPOSSESSION,
claimant's title may be legal or equitable, 275.
definition of, 274.
jus tertii available by defendant, but not by plaintiff, 275.
landlord claimant need not prove his title, 275.
licensor and licensee, 275.
limitation, 276.
acknowledgment of title, 276.
commencement of period of, 276.
disability, 276.
discontinuance of possession, 277.
ecclesiastical corporations, 276.
mere entry and continual assertion of claim no bar to running of statute, 277.
master and servant, 275.
mere possession evidence of title for defendant, 274.
plaintiff must rely on strength of his own title, 274.
plaintiff's title need not be indefeasible, 274.
successful plaintiff, 274.
tenant may show expiration of landlord's title, 275.

DOGS,
killing in defence of game, when justifiable, 283.
sheep or cattle, 283.
self defence, 283.
liability of owner for injuries by. *See* FEROCIOUS ANIMALS.
noisy, 227.

E.

EASEMENT,
grantee of, may enter upon servient tenement in order to repair, 268.
what is an, 237. *And see* NUISANCE.

EJECTMENT. *See* DISPOSSESSION.

EMPLOYERS' LIABILITY ACT, 209—211.
class of servant to which the Act applies, 211.

ENGINES
near highway. *See* NUISANCE.

EXECUTIVE OFFICERS,
general immunity of, 23.

F.

FALSE IMPRISONMENT, 241, 253, 260, 265.
See IMPRISONMENT.

FALSE REPRESENTATION. *See* FRAUD.

FELLOW SERVANTS. *See* MASTER AND SERVANT.

FELONY,
how suspension may be effected, 28 *et seq.*
remedy by action for, suspended until criminal trial ended, 28.

FENCES,
liability for injuries caused by dangerous, 219.
non-liability for trespass of cattle if adjoining owner bound to keep in repair, 268.

FEROCIOUS ANIMALS,
liability for injuries caused by, 196 *et seq.*
scienter the gist of the action for, 197 *et seq.*
presumption of *scienter*, 197.
proof of *scienter*, 197, 198.
scienter when sheep or cattle worried by dog need not be proved, 197.
See also ANIMALS.

FIRE
accidentally arising, 200.
liability of railway companies, 201.
persons intentionally lighting, must see that it does no harm, 200.
negligently allowing, to arise, liable for damage to neighbour's land, 200.
preventing from doing mischief, 200 *et seq.*
under Railway Fires Act, 1905, 202.
where farmer made fire on his land in high wind, spreading to neighbour's land, 201.
hayrick made near boundary of land, 201.

FIREWORKS
near highway. *See* NUISANCE.

FLOODS,
liability for, 193 *et seq.*
where damage from is partly attributable to *vis major*, 193.

FOREIGN COUNTRY,
torts committed in, when remediable in England, 43 *et seq.*

FOREIGN SOVEREIGNS
not liable for torts, 46.
but may waive the privilege, 46.

FRAUD, 161 *et seq.*
definition of, 161 *et seq.*
elements of legal, 161.
fraud followed by damage gives rise to action for deceit, 161, 163.
fraudulent character must be in writing to be actionable, 163.
liability for fraud of agent, 165.
honest misstatement by agent does not render principal liable, 165.
of directors and promoters of companies, 165.
prospectus issued in honest belief of its truth, 166.
statutory duty as to, 166.
mere silence not sufficient to give rise to action for deceit, 161.
negligent misrepresentation not the same as fraudulent misrepresentation, 166.
but may be ground for rescinding a contract, 164.
or a good defence to action for specific performance, 164.
when actionable, 162 *et seq.*
actual damage essential, 162 *et seq.*
false representation of value of business to a purchaser, 163, 164.
soundness of a dangerous instrument, 164, 165.
not necessary that fraudulent statement should have been made to plaintiff, if intended to be acted on by him, 163.
silence amounts to, 161.
where deceit and malice present, it is immaterial that there was no intention by defendant to reap any benefit, 164.
lying practical joke, 164.
principal intentionally keeps agent ignorant of a fact, causing misrepresentation, principal liable for, 165.

FRAUDULENT CONCEALMENT,
mere abstinence from mentioning a known defect is not actionable as a tort, 161, 164.

G.

GAME,
killing dog in order to preserve, when justifiable, 283.

GOODS. *See* NEGLIGENCE ; TRESPASS ; WRONGFUL CONVERSION.

GRATUITOUS DUTIES,
when misfeasance in performance of, gives rise to an action, 40.

GOVERNMENT DEPARTMENTS,
heads of, not liable for torts of their subordinates, 62.
masters of Government servants, 62, 63.

GUN,
accidents caused by, without negligence, 14.
injury to third party by explosion of a warranted, 164, 165.

H.

HIGHWAY,
authorities liable for damage resulting from misfeasance, 33.
not liable for damages resulting from nonfeasance, 33.
dedication of, to public not a grant of the land, 271.
manhole put in, 34.
obstruction of, 218.
trespass may be maintained by grantor of, for unreasonable use of it, *ex. gr.*, obstructing his right of sporting, 267, 271.

HORSE,
accident caused by a runaway, when excusable and when not, 13, 14.
injuries to, by dog, 197.

HOUSE,
liability for ruinous state of. *See* NUISANCE.

HUSBAND
liable for torts of wife, 51.
liability ceases if wife dies or marriage dissolved, 51, 52.
judicially separated, 51, 52.
not entitled to imprison his wife, 256.
or to sue her for tort, 45.

I.

ICE,
when a public nuisance, 16.

IMMORALITY. *See* DEFAMATION.

IMPRISONMENT,
by judges and magistrates, absolute immunity of judges of superior courts for, 21.
private persons and constables, 260.
arrest of—
breakers of the peace, 262.
exceptional cases in which a constable may arrest without warrant, 260.
cases of suspected felony where no felony has in fact been committed, 260, 261.
may arrest wherever a private person can, 260.
interrupter of divine service, 263.
malicious injurers, 263.
night offenders, 263.
no power given to husband to imprison wife, 256.

IMPRISONMENT—*continued.*
by private persons and constables—*continued.*
arrest of—*continued.*
officers, 256.
parents, 256.
particular powers of arrest given to individuals, 264.
suspected felon, when justifiable, 260, 261.
what suspicion sufficient, 261.
vagrants, 263.
acts of vagrancy, 263.
damages for, 265.
habeas corpus, 253, 254.
imprisonment by justices of the peace for breach of the peace, judicial authority, justification by, 257. 258.
distinction between false imprisonment and malicious prosecution, 257.
signing a charge sheet is not sufficient evidence, 258.
moral restraint constitutes, 253.
total restraint necessary, 253.
what constitutes, 253.
when not justified, 256.

INCORPOREAL HEREDITAMENT,
injury to. *See* LIGHT; SUPPORT; WATERCOURSE; WAY.

INEVITABLE ACCIDENT. *See* ACCIDENT.

INFANT,
generally liable for his torts, 46 *et seq.*
aliter if founded on contract, 47.
unborn, may claim damages under Lord Campbell's Act if father killed by negligence, 46.

INJUNCTION,
cases where damages given instead, 89.
church bells, 89.
general rule as to granting of an, 87 *et seq.*
granted even where it will inconvenience public, 90.
injuries remediable by, 87 *et seq.*
interlocutory or perpetual, 87 *et seq.*
rarely granted to restrain a libel, 89.
mandatory, 87.
noise, for, 88.
noxious fumes, for, 88.
obstruction of light and air, 89.
pollution of lake, 89.
remedy by, 87 *et seq.*
when granted to restrain libel, 89.

INJURIA,
meaning of, 8.

INSANITY,
imputation of. *See* DEFAMATION.

INSOLVENCY,
imputation of. *See* DEFAMATION.

INTENTION
not always material in torts, 12 *et seq.*

INTIMIDATION,
when actionable, 155 *et seq.*

INVOLUNTARY TORTS,
when actionable, 12, 13.

J.

JOINT OWNERS,
trespasses of, towards each other, 272.

JOINT TORT-FEASORS,
liability of, 49.
only one cause of action, 50.
what rights of contribution between, 49.
when partner commits a tort in regard to any third person, 50.

JUDGE,
powers of, to imprison. *See* IMPRISONMENT.
statements of, absolutely privileged communications, 121.

JUDICIAL OFFICERS,
general immunity of, 21.

JUDICIAL PROCEEDINGS,
how far privileged communications, 121, 122.

JURISDICTION,
torts committed outside, 43.

JUS TERTII,
defendant in ejectment may set up, but not claimant, 275.

JUSTICE OF THE PEACE. *See* IMPRISONMENT.

JUSTIFICATION. *See* ASSAULT ; DEFAMATION ; IMPRISONMENT ; TRESPASS.

L.

LANDLORD,
occupation of servant of, equivalent to personal occupation, 275.
title of, cannot be disputed by tenant, 275.
when liable for nuisance on demised premises, 222.

LIBEL. *See* DEFAMATION ; INJUNCTION.

LICENSEE,
possession of, is the possession of the licensor, 275.

LIEN,
sale of goods held under, a wrongful conversion, 288.

LIGHT AND AIR,
implied grants of light, 243.
a man cannot obstruct on property granted by him to another, 243.
in general no right to air can be gained, 243, 244.
aliter for access of air through defined openings or passages, 243, 244.
no right to, *ex jure naturæ*, 242.
right to, can only be by prescription, grant or reservation, 242.
rights to light gained by prescription, 243.
interruptions sufficient to rebut prescription, 243, 244.
no interruption allowed after nineteen years, 244.
but injunction not granted until full twenty years, 244.
what amount of damage necessary to support action, 243—245.
where the right arises by express grant depends on construction of the grant, 244.
where the right arises by implied grant or prescription the sole question is whether the deprivation amounts to a nuisance, 244, 245.

LIMITATION
commencement of period of, 96.
commencement of period when tort continuing, 96.
concealed fraud, 94.
conversion, 95.
disability, 97.
arising subsequently to commencement of period, 97.
in the case of nuisance, 97.
taking away support of land, 95.
when tort consists of actual damage, commencement of period of, 94.
great distinction between real property limitation Acts and those relating to chattels, 96.
in particular cases. *See* under the several headings of those cases.
of actions of tort, 94.
reasons for, 94.
under Employers' Liability Act, 210.
Public Authorities Protection Act, 1894, 98.

LOSS OF SERVICE. *See* SEDUCTION.

LUNATIC
liable for his torts, 46.

M.

MAGISTRATE. *See* IMPRISONMENT.

MAINTENANCE,
definition of, 143.
when action maintainable for, 143.
not where common interest between maintainer and maintained, 143 *et seq.*
nor where maintainer actuated by charitable motives, 144.

MALICE
not usually material in torts, 14 *et seq.*

MALICIOUS PROSECUTION, 133.
bankruptcy, maliciously taking proceedings in, 140.
definition of, 133 *et seq.*
factors necessary for maintaining action for, 133, 140.
"prosecution" includes bankruptcy and liquidation proceedings, 140.
when actionable, 140.
(1) *Prosecution by defendant*, 134.
prosecution ordered by a magistrate on defendant's information as to facts not sufficient, 134.
unless defendant after ascertaining the innocence of plaintiff maliciously continues the prosecution, 134.
(2) *Want of reasonable and probable cause*, 135.
amount of care required, 136, 137.
duties of judge and jury as to, 135.
onus of proof on plaintiff, 135.
opinion of counsel in favour of prosecution no excuse, 136.
what constitutes, 136.
(3) *Malice*, 137.
adoption of proceedings already commenced, 134.
defective memory, 138.
generally implied, 137.
honest but stupid mistake, 138.
knowledge of defendant that he was in the wrong, evidence of malice, 137.
malice may be implied in a corporation, 138.
subsequent malice of the defendant, 134.
to stop plaintiff's mouth, 137.
(4) *Setting aside of proceedings, a condition precedent to action for*, 138.
explanation of the reasons for this, 138, 139.
(5) *Actual damage must be proved*, 139.
need not be pecuniary, 139.

MANUFACTURE,
noxious or offensive, an actionable nuisance. *See* INJUNCTION; NUISANCE.

MARRIED WOMAN
cannot sue her husband for a tort, except for protection and security of her own separate property, 45.
her husband also still liable, 51 *et seq.*
liable for her torts, 51 *et seq.*
may sue for a tort without joining her husband, 45.

MASTER AND SERVANT,
as to enticing and seducing servants. *See* SEDUCTION.
general liability of master for torts of, 56 *et seq.*
accidents occasioned by carelessness of servant, 56, 58 *et seq.*
constitution of a binding ratification, 55.
contractor or intermediate employer liable for torts of workmen, 65, 66.
distinction between unlawful method of doing what he was engaged to do, and unlawful act completely outside the scope of his engagement, 58 *et seq.*
job-master liable, and not hirer of horses, 57.
liability of master for assaults of servant committed in scope of his employment, 60.
master not liable for injuries caused by servant while driving master's carriage on business of his own, 58.
master not liable for servant's torts when committed outside or beyond scope of his employment, 56, 58 *et seq.*
master not liable for torts committed by persons employed by servant to do his work, 61, 62.
master when liable for illegal act of servant, 56.
liable for wilful act of servant if within the general scope of his authority, 56, 58 *et seq.*
meaning of term "servant," 56.
ratification of servant's tort, 54, 55.
servant giving person into custody is not usually acting within the scope of his employment, 59, 60.
unauthorised delegation by a servant of his duties excuses master from delegate's torts, 61, 62.
who are servants, 57.
inducing servant to break his contract of service, 146, 153.
master may in general sue for a tort which deprives him of services of servant, 73.
aliter if servant be killed, 73.
when person liable at common law for injuries caused by servant to fellow servant, 204 *et seq.*
And see EMPLOYERS' LIABILITY ACT.
master knowingly employing an unskilful servant, 204.
not liable where there is common employment or a voluntary acceptance of risk, 204.
meaning of common employment, 204.
personal negligence of master, 204, 207.
volunteer helpers are in the position of servants with regard to suing the master for negligence of his true servants, 208.
aliter where acting with master's consent or acquiescence, 208, 209.

MEASURE OF DAMAGES. *See* DAMAGES.

MEDICAL EXPENSES. *See* CAMPBELL'S (LORD) ACT.

MEDICAL MEN,
negligence of, 39.
slandering. *See* DEFAMATION.

MINE,
flooding of, by water brought by defendant on to his land actionable without proof of negligence, 193, 194.

MISFEASANCE, 34.
highway authorities liable for damage resulting from, 33.
liability for, 41.

MISREPRESENTATION. *See* FRAUD.

MISTAKE
no justification, 12, 13.

MITIGATION. *See* DAMAGES.

MORAL GUILT
generally immaterial in cases of tort, 14—16.
aliter in case of fraud, 15, 16.

N.

NECESSITY,
may excuse what would otherwise be a tort, 19, 268.

NEGLIGENCE,
actions by representatives of a person killed by, 71—75.
See CAMPBELL'S (LORD) ACT.
amount of care required depends on circumstances, 167, 168.
bailees of goods, duty of, 176.
caused by want of skill, 168.
contributory, 181.
contributory negligence of carrier to whom plaintiff has entrusted himself, no excuse, 183.
in infants, 183.
joint negligence of plaintiff and defendant, 182.
where contributory, affords no excuse, 182.
definition of, 167 *et seq.*
duties of judge and jury in actions for, 187.
duty of occupiers of land and houses, 171.
as to licensees and guests, 173.
trespassers, 173, 175.
not to set spring gun on land, 175.
injuries caused through defective grand stand, 174.
journeyman gasfitter falling through trap-door, 174.
landlord and tenant, duty as between, 172.

NEGLIGENCE—*continued.*
duty of occupiers of land and houses—*continued.*
not to put any unexpected danger without warning licensee, 171.
obstruction in private road, injury caused through, 175.
person coming by invitation, 171, 172, 174.
to use reasonable care to prevent damage, 171.
duty to take care arises out of many relations, 167.
extra care required where defendant has control of dangerous things, 177 *et seq.*
dangerous and savage animals, 196 *et seq.*
when *scienter* necessary, 197.
stacking of hay, 201.
entrusting loaded gun to inexperienced servant girl, 179.
selling deleterious hairwash, 179.
or even lending dangerous chemicals or other things without warning, 179.
third person finding loaded gun consciously firing it, 179.
grouping of relations necessitating exercise of care, 167, 168.
highway, duty of persons using to take care, 169.
negligence of person driving or riding on, 169.
illustrations of effective cause, 184, 185.
not actionable unless it be proved that defendant's negligence was the proximate cause of the injury, 184.
of carriers of passengers, 170.
infant travelling without a ticket, injured by negligence, company liable, 171.
person injured whilst travelling on footboard of train in defiance of a byelaw, 171.
onus of proof of, 185 *et seq.*
accident capable of two explanations, 186.
aliter where the accident would not be likely to happen without negligence, 185, 186.
generally on plaintiff, 185.
heavy article dropping out of window, 186.
railway train thrown off the line, 186.
runaway horse, 185.
skidding motor omnibus, 186.

NEWSPAPERS. *See* DEFAMATION.

NOISE. *See* INJUNCTION; NUISANCE.

NOXIOUS TRADE. *See* NUISANCE.

NUISANCE,
actions in respect of, 220.
allowing dangerous things (such as water or electricity) to escape, 192.
definition of, 217.
description of nuisances, 217, 218.
either public or private, 217, 218.
examples of, 218 *et seq.*

NUISANCE—*continued.*
franchises, 238.
right to vote for member of parliament, 238.
rights of ferry and market included in, 238.
trade marks, copyrights and patent rights included in, 238.
line between public and private, rather fine, 287.
malicious motive immaterial, 225.
meaning of term, 217.
prescription to commit, 232.
by Prescription Act seldom necessary to presume lost grant, 233.
twenty years enjoyment of right, 233.
right given to discharge foul water on land, 232, 233.
private, what is, 217.

(1) *Private injury from public nuisance,* 218 *et seq.*
abatement of public nuisances, 221.
boys breaking railings of area, owner not liable, 224.
dangerous adjacent buildings, relative liabilities of landlord and tenant for nuisance caused by, 223.
examples of public nuisances, 218 *et seq.*
church bells, 88.
excavations on highways, 218.
fumes, 88.
ruinous or dangerous fences or premises on highways, 218.
liability of highway authority, 219.
landlord and tenant respectively, 221 *et seq.*
excavations not adjacent to roads not actionable, 219.
owner or occupier not liable for nuisance created by a third person without his knowledge, 223.
particular damage, 220.
business interfered with is, 220.
being rendered dark or less commodious, 220.
interference with private right is, 220, 221.
obstruction cutting off access to highway, 221.
of a highway, 221.
public nuisance only actionable in respect of, 220.
when actionable, 218.
authorised by statute, 219.

(2) *Causing injury to corporeal hereditaments—*
definition of, 225.
disgusting fumes, 226.
distinction between injury to property and annoyance in its user, 229.
entertainments causing crowds and noise, 227.
immaterial whether plaintiff goes to the nuisance or it to him, 230.
interference with enjoyment of property, 227.
noise from pestle and mortar nuisance to consulting room, 231.

NUISANCE—*continued.*
(2) *Causing injury to corporeal hereditaments—continued.*
noisy dogs, 227.
entertainments, 227.
printing machine, 231.
trade, 226.
overhanging eaves, 227.
trees, 227.
pigstys, 227.
reasonableness of place, when no excuse, 228.
small-pox hospital, 227.
the nuisance must be material, 225.

(3) *Affecting incorporeal hereditaments—*
disturbance of natural right to support, 238.
easements and servitudes, 237 *et seq.*
no right to support by subterranean water, 240.
aliter of other substances such as wet sand or pitch, 240.
profits *à prendre*, 237.
railway and canal companies have no right of support, 240.
remedy by abatement, 235.
not applicable to prospective nuisances, 235.
pulling down inhabited house, 236.
injunction. *See* INJUNCTION.
of reversioner, 234.
right arises *ex jure naturæ*, 239.
of support for land burdened with buildings, 241.
can be gained only by prescription or grant, 241.
may be similarly acquired for support from adjacent houses, 241.
to light and air, 242 *et seq.*
See LIGHT AND AIR.
watercourse, 245 *et seq.*
See WATERCOURSE.
ways, 248.
See WAY.
subterranean water, pumping brine from, 240.
title to easements, 237.
where natural right to support is infringed, the consequent damage to a modern house may be recovered, 241.

O.

OBSTRUCTION
of light and air, 244.
See LIGHT AND AIR.
road, 248.

OUSTER. *See* DISPOSSESSION.

P.

PARTNERS,
liability of, for each other's torts, 52 *et seq.*
for torts other than fraudulent misappropriations, *ib.*
fraudulent guarantees, 53.
is joint and several, 53.

PARTY-WALL,
trespass to, 272.

PERJURY,
imputation of, not actionable, unless made with reference to a judicial inquiry, 110, 111.
no action lies for consequences of, 122.

PERSONAL PROPERTY,
trespass to. *See* TRESPASS.

PIGSTY. *See* NUISANCE.

PIT,
accidents from unguarded, 13.

POISONOUS TREES, 195.

POLLUTION OF WATER, 246, 247.

POSSESSION,
writ of. *See* NUISANCE; TRESPASS.

PRESCRIPTION. *See* LIGHT AND AIR; NUISANCE; SUPPORT; WATERCOURSE; WAY.

PRINCIPAL,
liability of, for acts of agent, 55 *et seq.*
See AGENT.

PRINTER. *See* DEFAMATION.

PRIVATE WAY. *See* WAY.

PRIVILEGED COMMUNICATIONS. *See* DEFAMATION.

PRIVITY
in torts arising out of contract, 38 *et seq.*

PROBABLE CAUSE. *See* MALICIOUS PROSECUTION.

PROBABLE CONSEQUENCE,
every man presumed to intend the, of his acts, 12.

PROFESSIONAL MEN,
negligence of, 39.

PUBLIC CONVENIENCE
does not justify a tort to an individual, 90.

PUBLIC NUISANCE. *See* NUISANCE.

PUBLIC RIGHT,
infringement of, coupled with peculiar damage to an individual, 7, 10.

PUBLICATION. *See* DEFAMATION; DEFAMATORY ARTICLE.

Q.

QUALIFIED RIGHT,
infringement of coupled with damage, 7, 10.

QUESTIONS, 293.

R.

RAILWAY COMPANY. *See* CONTRACT; MASTER AND SERVANT MISFEASANCE; NEGLIGENCE; NUISANCE.

RATIFICATION. *See* MASTER AND SERVANT.

RECAPTION,
remedy by, 290.

REPLEVIN,
action of, 291.

REVERSIONER
may enter into and inspect premises, 268.
no remedy given to, for mere transient trespasses or nuisances, 234.
remedy of, for injury to land, 234.
obstructions, 234.
for injury to personal property, 284.
some injury to the reversion must be proved, 234, 235.

RIVER. *See* WATERCOURSE.

RUINOUS PREMISES. *See* NUISANCE.

RUNAWAY HORSE,
how far owner liable for damage caused by, 13, 14.

S.

SCIENTER. *See* FEROCIOUS ANIMALS

SEDUCTION,
action for, whence arising, 145.

SEDUCTION—*continued.*
contract of service, when implied, where the girl is plaintiff's daughter, 146 *et seq.*
small services suffice, 147, 148.
when daughter lives with her father, and is a minor, service is presumed, 146 *et seq.*
aliter where the daughter acts as another's housekeeper, 148.
not even where she supports her father, 148.
where service to another is put an end to, the right of the parent revives, 149.
damages in, 150.
And see DAMAGES.
aggravation of, 150.
breach of promise of marriage not technically matter of aggravation, 150 n.
mitigation of, 151.
previous immorality or looseness, 151.
daughter, of, father may bring action for loss of services of, 146, 147.
if parent helps to bring about his own dishonour he cannot recover, 149.
of orphan girl, action by brother, 149.
servant from master's employ is actionable, 146.
relation of master and servant essential, 146.
relation of master and servant must subsist at time of seduction and of confinement, 146 *et seq.*
temporary visit no termination of service, 147.
who may bring action for, 147.

SELF-DEFENCE,
tort committed in, 19, 254, 255, 268, 283.

SERVANT
may sue for loss of luggage or personal injury although master paid the fare, 39.
See MASTER AND SERVANT.

SEWER,
nuisance caused by defective, 218.

SHAFT,
unguarded, 13.

SHEEP,
injuries to, by dog actionable without proof of *scienter*, 197, 198.

SHOOTING
by accident not actionable, 14.
not guilty of imprudent act, 14.

SLANDER. *See* DEFAMATION.

SOLICITOR,
slandering a, 112.

SOVEREIGN
not liable for torts, 46.
nor foreign, 46.

SPRING-GUNS. *See* NUISANCE.

STATUTE,
acts authorised by, actionable when negligence proved, 25.
not actionable, 24, 25.

STATUTORY DUTIES,
breaches of, 31 *et seq.*
created for benefit of individuals, 31 *et seq.*
the public, 32, 33.
highway authorities not liable for neglect to perform, 33.
negligence in carrying out, 25.
of highway and sanitary authorities, 34, 35.

STRIKERS,
torts by, 153 *et seq.*

SUPPORT. *See* NUISANCE (2).

T.

TENANT
cannot dispute landlord's title, 275.
but may show that title has expired, 275.
See LANDLORD.

TEST QUESTIONS, 293.

TITLE. *See* DISPOSSESSION; TRESPASS.

TORT,
act or omission must be unauthorised, 19.
authorised acts or omissions, what are, 11.
colonial governor is not a sovereign, and may be sued for, 48.
classification of rights, 11.
of property, 12.
definition of, 7, 11.
distinction between actions for, and for breach of contract, 37.
nature of a, discussed, 7 *et seq.*
relation of, and contract, 37 *et seq.*
waiver of, 279.
who may sue for a, 45.
be sued for, 46.

TRADE MOLESTATION,
breach of contract, inducing, 153.
without sufficient justification, 153.
by threats, violence and conspiracy, 155.
warning employers of consequences is not a threat, 156.
where people by conspiracy further their own trade interest, 157.

TRADE MOLESTATION—*continued.*
procuring breach of contract by fraud, 155.
securing custom unlawfully, 157.
passing of goods as those of another, 158.
use of one's own name, 158, 159.
under Trade Disputes Act, 1906, 154.

TRADE UNIONS,
torts by members of, 153 *et seq.*
Trade Disputes Act, 1906, gives, complete immunity from actions of tort, 48, 49.

TRAP,
illegal to permit any danger to exist in the nature of a, 171.
even against trespassers, 173.

TREES,
poisonous, overhanging a neighbour's land, 195.

TRESPASS,
To the person, 249.
actionable without proof of damage, 249.
See ASSAULT; BATTERY; FALSE IMPRISONMENT.
To lands (quare clausum fregit), 267 *et seq.*
And see also DISPOSSESSION.
any user going beyond that authorised, 267.
ex. gr. unreasonable use of public right of way, 267, 268, 270.
by straying cattle, 267.
damages for. *See* DAMAGES.
definition, 267 *et seq.*
driving nails into wall is, 267.
injuries to party walls, 272.
justification of, 268.
carrying away of soil by one of two joint owners, 272.
in distraining for rent, 268.
driving cattle off plaintiff's land, 268.
executing legal process, 268.
by grantee of easement for the purpose of making repairs, justifiable, 268.
reversioner inspecting premises, 268.
in escaping a pressing danger, 268.
under due legal authority, 268.
re-taking goods, 268.
limitation of actions for, 272.
of joint owners, 272.
onus of proof of title lies on primâ facie trespasser, 270.
plea of *liberum tenementum*, 269.
possession by relation, 271.
dates back to title, 270.
necessary to maintenance of action for, 270.
reasonable working of coal mine by joint owner, 272.
remedies other than by action, 273.
distress and *damage feasant*, 273.
to highways, 267, 271.

TRESPASS—*continued.*
To lands (*quare clausum fregit*)—*continued.*
justification of—*continued.*
trespassers, *ab initio*, 269.
when surface and subsoil in different owners, 271.
when two people are in adverse possession, possession in persons entitled, 270.
no actual damage required to support action for, 267.
remedy for, by distress *damage feasant*, 273.
To goods, etc., 279.
action of replevin, 291.
conversion to enforce pledge, 284.
defendant cannot in general set up *jus tertii*, 288.
destruction of goods by bailee, 282.
distinction between fraudulent contract and no contract, excessive sale by sheriff, 281. 282.
good intention no excuse, 280, 281.
killing game or animals *feræ naturæ*, 283.
kindly officiousness may amount to, 281.
no remedy if animals get injured whilst trespassing, unless defendant used unreasonable force, 283.
no trespass if plaintiff in fault, 283.
possession necessary to maintenance of action, 284.
follows title, 284.
bailee delivering goods to an unauthorised person revests possession in bailor, 287.
damages for sale of goods by persons having a lien, 288.
possession of finder, 288.
primâ facie proof of title, 288.
sale by a person having a lien is a trespass, 288.
trustee may maintain trespass for injuries to goods when possession actually in *cestui que trust*, 288.
what possession suffices, 288.
purchasing goods without title, 282.
in market overt, 282.
recaption, 290.
shooting a trespassing dog, when allowable, 283.
stolen goods, 291.
to animals, 281, 283.
trespass *ab initio*, 286.
in defence of property, 283.
exercise of right, 284.
legal authority, 284.
self-defence, 283.
trespasses of joint owners, 290.
waiver of tort, 289.

TROVER. *See* WRONGFUL CONVERSION.

TRUSTEE
may maintain trespass or conversion for injuries to goods when actual possession in *cestui que trust*, 288.

U.

UNDERGROUND WATER,
man has right to pump, from subsoil under his own land, 15.
not actionable when spitefully done to injure neighbour being lawful act, 15.

UNFENCED SHAFT OR QUARRY, 13.

V.

VIS MAJOR
excuses what would otherwise be actionable, 191, 193.
exceptions, 193.

VOLENTI NON FIT INJURIA, 27, 189.
doctrine of, 189.
inapplicable to breach of statutory duty, 190.
situation of alternative danger, 188.
incurring risks, 27, 28.
not conclusive evidence of, 190.

VOLITION,
how far necessary to tort, 12, 13.

VOLUNTEERS
not in general entitled to recover for negligence of a party or his servants, 208, 209.

W.

WALL,
party, 272.
trespass to, by sticking nails into it, 267.

WARRANT. *See* CONSTABLE.

WATER,
causing accumulation of, whereby another's property is injured, is actionable, unless injury caused by *vis major*, 193, 194.
aliter, if caused by fault of a third party, 194.

WATERCOURSE,
damage essential to an action for disturbance of, 246.
disturbance of right to use of, 246.
drawing off underground water, where actionable, 246, 247.
fouling a well, 247.
penning back water in, 247.
prescriptive rights in derogation of other riparian proprietors, 248.
right to use of surface watercourse vested in riparian proprietors, *aliter* with regard to subterranean water, 246. 245.
rights may be gained in an artificial, 246.

WAY,
customary right of, 248.
obstruction of a public, may be a tort, 10.
private, 248.
only gained by prescription or grant, 248.
prescriptive rights of way, 248.
private right of way distinguished from public right of, 248.
right of, 248.
strictly limited by terms of grant or by mode of user, 248.

WIFE,
damages in such action, 72.
liability of husband for torts of, 51.
may sue for loss caused by the killing of her husband, 72, 73.
without joining her husband, 45.

WINDOWS. *See* LIGHT AND AIR.

WORDS. *See* DEFAMATION.

WORKMEN'S COMPENSATION,
alternative remedies, 216.
if right to or amount of compensation disputed, 215.
serious and wilful misconduct proved, employer not liable,
liability of employer to pay compensation, 212 *et seq.* 214, 215.
accidents—
"arising out of," 213, 214.
"in the course of," 214.
injury by, 213.
what is, 213.
scale of compensation, 215.
in the case of death, 215.
total or partial incapacity, 215.
what workman must show to entitle him to compensation,
under Act of 1906, 211. 212, 213.
to whom it applies, 215.
words "injury" and "accident," meaning of, 213.

WRONGDOER,
all things are presumed against a, 80.
any possession sufficient to sustain trespass against a, 270, 284.

WRONGFUL CONVERSION,
conversion and detention, 286.
judgment for return of specific goods, 287.
in an action for, 286.
is for damages only, 287.
plaintiff need not show good title to goods as against every one, 286, 287.
only show that he is entitled to them as against defendant, 286.
proof of, 287.
to maintain an action for, 286.
conversions of joint owners, 290.

WRONGFUL CONVERSION—*continued.*
definition of—
"conversion," 279.
"detention of goods or detinue," 279.
"trespass," 279.
possession follows title, 284.
any possession suffices against a wrongdoer, 288.
possession of finder, 288.
primâ facie evidence of title, 288.
sale by one having a lien is a conversion, 288.
unauthorised delivery by bailee revests possession bailor,
possession necessary to maintenance of action for, 284. 287.
recaption, 290.
replevin, 291.
restitution of stolen goods, 291.
reversioner cannot sue for, 284.
reversioner's remedy, 284.
subsequent conversions of lawfully-obtained chattel, 286.
waiver of tort, 289.
what is, 279.
conversion of damages, 280.
destruction of goods by bailee, 281.
detinue for return of goods, 280.
excessive execution, 281.
good intention no excuse for officious interference, 281.
purchase of goods from a person not entitled, even by a bonâ fide purchaser, 282.
from person who has obtained goods by fraud may or may not be a conversion, 282.
is convicted of obtaining the goods by false pretences, 283.
of goods in market overt, 282.
selling another's goods by mistake, however bonâ fide, 282.
when defendant may set up *jus tertii*, 288.

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